TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted]31

GREENPORT BASIN AND CONSTRUCTION COMPANY, PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE UNITED STATES.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED FEBRUARY 24, 1923.

(26,112)

(28,112)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 755.

GREENPOINT BASIN AND CONSTRUCTION COMPANY,
PLAINTIFF IN ERROR AND APPELLANT,

vs.

THE UNITED STATES.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1921.

1 EASTERN DISTRICT OF NEW YORK, *ss:*

I, Percy G. B. Gilkes, Clerk of the United States District Court for the Eastern District of New York do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, prepared and made by me in accordance with the præcipe filed in the cause entitled Greenport Basin & Construction Company, appellant and plaintiff in error against The United States, Appellee and defendant in error as the same appear from the original record and files thereof now remaining in my custody and control.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at my office in the Borough of Brooklyn, City of New York, in said district this 21st day of February 1921.

[Seal of District Court of the United States, Eastern District of New York.]

PERCY G. B. GILKES,
Clerk.

2 United States District Court, Eastern District of New York.

GREENPORT BASIN AND CONSTRUCTION COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant.

To the Honorable Judges of the United States District Court for the Eastern District of New York:

The petition of Greenport Basin and Construction Company respectfully shows:

1. That the plaintiff is a domestic corporation having its legal residence and principal office and place of business at Greenport, Suffolk County in the Eastern District of New York and that its business is building and repairing ships and vessels and that it was subject to taxation under the Act of Congress known as the War Revenue Act approved October 3rd, 1917.

2. That at all times mentioned herein up to the 25th day of November 1918, one Henry P. Keith was the duly appointed, qualified and acting Collector of Internal Revenue for the first district of New York.

3. That on or about March 26th, 1918, the plaintiff above named made and filed with Henry P. Keith, then the duly appointed, qualified and acting Collector of Internal Revenue for the first district of New York aforesaid, being the district in which plaintiff has its principal place of business and legal residence upon the forms prescribed by the Commissioner of Internal Revenue, a corporation

excess profits tax return for the taxable year ending October 31st, 1917, being the plaintiff's fiscal year and a return according to said fiscal year having been duly permitted by the proper Collector, whereby the said plaintiff showed a net income for said taxable year of $76,361.20; and invested capital for the year in question amounting to $215,615.55; that it thereby as permitted by law and the regulations thereunder elected to accept 7% as a deduction from its net income which said deduction computed at above rate on the invested capital for the taxable year amounting to $15,093.08 and adding thereto the exemption of $3,000.00 allowed by law amounted in all to a total deduction of $18,093.08 and thereupon under compulsion of the regulation prescribed by the Commissioner of Internal Revenue computed the excess profits tax due upon its net income as aforesaid at the sum of $20,205.31 whereof the proportion taxable to October 31st, 1917 in like manner computed was $16,837.76, to a copy of which return annexed hereto plaintiff asks leave to refer as part of this petition.

4. That on the date aforesaid, the plaintiff further appealed to the Commissioner of Internal Revenue and made out a claim for abatement of taxes assessed, based upon the return aforesaid and upon the regulations of the Treasury Department which required the tax so to be computed and filed the said claim for abatement in the form prescribed by the Treasury Department, duly verified, with the then acting Collector of Internal Revenue for the first district on the date aforesaid, and a copy of said claim for abatement is annexed hereto and is hereby referred to and made a part hereof.

5. That subsequently and on or about the 1st day of June 1918, the Collector of Internal Revenue for the first district of New York assessed and levied the excess profits tax upon the plaintiff aforesaid upon its return as aforesaid and thereupon fixed and determined the amount thereof to be $16,837.76.

6. That thereafter and on or about November 14th, 1918, the plaintiff appealed to the Commissioner of Internal Revenue from said action and filed with the said Henry P. Keith, Collector as aforesaid a claim for a refund of taxes with reference to the excess profits tax computed as above whereof a true copy is annexed hereto and is hereby referred to and made a part hereof.

4 7. That more than six months have elapsed since the said filing of the said appeal and claim for abatement and that more than six months have elapsed since the filing of the appeal and claim for refund aforesaid but that the Commissioner of Internal Revenue has not rendered a decision upon the said appeal and claim for abatement and appeal and claim for refund, and no refund has been made or ordered.

8. That on or about June 13th, 1918, the plaintiff paid to Henry P. Kieth then Collector of Internal Revenue for the first district of New York the amount of such excess profits tax, levied as aforesaid to wit, the sum of $16,837.76.

9. That according to the true meaning and intent of the law, the entire amount due for excess profits tax calculated upon the total net income of the plaintiff as above set forth after deducting therefrom the sum of $18,093.08 is the sum of $14,900.84 and that the total amount due thereon for the part of the fiscal year of the plaintiff within the calendar year 1917 is the sum of $12,417.36 and no more, and that the excess thereof collected and required of the plaintiff, to wit, the sum of $4,420.40 is wholly illegal unjust and contrary to the law and that the Treasury Department's regulations #41 Article 16, 17 and form #1103 regulating the manner of deducting the allowed deduction and the manner of computing and levying the excess profits tax are contrary to the law in that such regulations, forms and requirements of the Treasury Department in relation thereto erroneously applied the excess profits tax on all net income, allowing the deduction to be taken only from the profits amounting to 15% of the invested capital calculated from the beginning of profits and so on instead of first deducting the allowed deduction from the entire sum of net profits and thereafter applying the excess profits tax to the residue segregated into the 15%, 20%, 25% and 33% classes and so on and that the exaction and collection of the sum aforesaid from the plaintiff was so far as it exceeds the sum of $12,417.36 wholly contrary to the law and hence illegal and void and should be abated and refunded.

Wherefore plaintiff demands judgment upon the facts and law and for the sum of $4,420.40 with interest from the 13th day of June 1918 together with costs.

PERCY L. HOUSEL,
Attorney for Plaintiff.

Office and Post Office Address, Riverhead, N. Y.

STATE OF NEW YORK,
County of Suffolk, ss:

C. Pliny Brigham being duly sworn says that he has read the foregoing Petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true, and that the reason why he makes this verification instead of the plaintiff is that the plaintiff is a corporation of which deponent is an officer, to wit, Secretary and Treasurer thereof.

C. PLINY BRIGHAM.

Sworn to before me this 15th day of December 1919.

BERTHA H. CORWIN,
Notary Public, Suffolk County, N. Y.

6 *Statement of The Greenport Basin & Construction Company for Year Ending October 31st, 1917.*

Dr.

Real Estate	$31,751.85
Buildings, machinery and plant	97,387.03
Inventory	42,223.94
Contracts	95,535.30
Accounts receivable & accrued assets	34,281.06
Cash	125,907.27
Liberty Bonds	10,300.00
Federal taxes 1917	735.25
	$438,121.70

Cr.

Capital stock	$124,000.00
Mortgages	11,500.00
Accounts payable	139,336.62
Bills payable	9,000.00
Surplus	77,923.88
Profits, year	76,361.20
	$438,121.70

Statement of The Greenport Basin & Construction Company October 31st, 1916.

Dr.

Real Estate	$31,751.85
Buildings, machinery & plant	103,671.59
Inventory	46,040.76
Cash	150,924.87
Accounts receivable & accrued assets	22,543.64
	$354,932.71

Cr.

Capital stock	$124,000.00
Mortgage	18,425.00
Contracts unfinished	6,525.29
Accounts payable and accrued liabilities	72,258.54
Surplus	97,891.04
Profits, year	35,832.84
	$354,932.71

7

Claim for Abatement.

Taxes Erroneously or Illegally Assessed.

STATE OF NEW YORK,
County of Suffolk, ss:

Greenport Basin and Construction Company, Name of claimant.
Greenport, New York, Address of claimant.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant, Building and repairing vessels.

2. Character of assessment or tax, Excess Profits Tax.

3. Amount of assessment, $16,837.76.

4. Amount now asked to be abated, $4,420.40.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

On the ground that the Treasury Department's Regulations No. 41 Articles 16, 17 and form No. 1103 regulating the manner of deducting the allowed deduction and the manner of computing and levying the excess profits tax are contrary to the law and in that such regulations, form and the requirements of the Treasury Department in relation thereto erroneously apply the excess profits tax on all the net income, allowing the deduction to be taken only from the 15% of net profits calculated from the beginning of profits and so on, instead of first deducting the allowed deduction from the entire sum of net profits and thereafter applying the excess profits tax to the residue segregated into the 15%; 20%; 25% 33% classes and so on in such manner that the excess profits tax of the company above named upon the net profits for the fiscal year ending October 31, 1917 should be, and according to the law must be, calculated as follows:

Greenport Basin and Construction Company.

Excess Profits Statement, Correct Method.

Net Profits	$76,361.20
Deduction	18,093.08
	$58,268.12
15%—32,342.33—20%	6,468.47
5%—10,780.77—25%	2,695.19
5%—10,780.77—35%	3,773.27
8%— 4,364.25—45%	1,963.91
over 33—None	
58,268.12	
	$14,900.84
10/12	12,417.36

and all the residue assessed under the Treasury Regulations form and requirements was and is contrary to the law and hence illegal and void and should be abated.

(Signed) THEODORE WM. BRIGHAM,
President.

C. PLINY BRIGHAM,
Treasurer.

Sworn to and subscribed before me this 11th day of March 1918.
FRED B. CORY,
Notary Public.

(Here follow reproductions of claim for refund and corporation excess-profits tax return, marked pages 8–13, inclusive.)

TREASURY DEPARTMENT,
U. S. INTERNAL REVENUE.
Form 46—Revised March, 1918.
Ed. 150,000.

CLAIM FOR REFUND.

TAXES ERRONEOUSLY OR ILLEGALLY COLLECTED.

ALSO AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS.

Date of filing to be plainly stamped here

State of New York. } ss:
County of Suffolk. }

IMPORTANT.
This claim should be forwarded to the Collector of Internal Revenue to whom the Tax was paid and must be accompanied by Collector's Receipt therefor.

Write Name as it can be easily read.

Greenport Basin and Construction Company.
(Name of claimant.)

Greenport, New York.
(Address of claimant; give street and number as well as city or town, and State.)

This deponent being duly sworn according to law deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete:

1. Business engaged in by claimant Building and repairing vessels.

2. Character of assessment or tax Excess Profits Tax.
(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps $ 16837.76

4. Amount now asked to be refunded (or such greater amount as is legally refundable) $ 4420.40

5. Date of payment of assessment or purchase of stamps

Deponent verily believes that the amount stated in Item 4 should be refunded and claimant now asks and

On the ground that the Treasury Department's Regulations No. 41 Articles 16,17 and form No. 1303 regulating the manner of deducting the allowed deduction and the manner of computing and levying the excess profits tax are contrary to the law and in that such regulations, form and the requirements of the Treasury Department in relation thereto erroneously apply the excess profits tax on all net income allowing the deduction to be taken only from the 15% of net profits calculated from the beginning of profits and so on, instead of first deducting the allowed deduction from the entire sum of net profits and thereafter applying the excess profits tax to the residue segregated into the 15%; 20%; 25%; 33% classes and so on in such manner that the excess profits tax of the company above named upon the net profits for the fiscal year ending October 31, 1917 should be, and according to the law must be, calculated as follows.

Greenport Basin and Construction Company
Excess Profits Statement, Correct Method.

and all the residue assessed under the Treasury Regulations form and requirements was and is contrary to the law and hence illegal and void and should be abated.	Net Profits			$76361.20
	Deduction.			18093.08
				$58268.12
	15%-	32342.33 - 20%		6468.47
	5%-	10780.77 - 25%		2695.19
	5%-	10780.77 - 35%		3773.27
	8%-	4364.25 - 45%		1963.91
	over 33-	none	10/12	14900.84
				12417.36

And this deponent further alleges that the said claimant is not indebted to the United States in any amount whatever, and that no claim has heretofore been presented, except as stated herein, for the refunding of the whole or any part of the amount stated in Item 3.

Sworn to and subscribed before me this ..... Signed:

day of November ..... *19* 18.

Write Name so it can be easily read. Greenport Basin & Construction Co

Fred B. Cory, Notary Public. by Theodore Wm. Brigham,
(Name.) (Title.) President.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue without charge.)

8

STATES INTERNAL REVENUE.

SS PROFITS TAX RETURN

(Do not write in this space)
RECEIVED

October 31, , 1917.

d Construction Company.

t, N.Y.

LIST.

Month.	Page.	Line.

Audited by

ls. *Date established*

INSTRUCTIONS.

his years 1911, 1912, and 1913, designated by the act of October 3, 1917, as the prewar period, in
War has not succeeded to the control of a business which was carried on during any one or more
la- those years, the first deduction is an amount equal to 8 per cent of the amount of invested
capital. Otherwise the deduction is an amount equal to the same percentage of the invested
ble capital for the taxable year as the average net income during the prewar period was of
its average invested capital during that period, provided that if such percentage is less than 7 p
fits cent, the deduction shall be computed at the rate of 7 per cent and if more than 9, at the r
of 9 per cent (see Excess Profits Tax Regulations, Article 21).

net In order to take advantage of this provision, the corporation must make a return of invested
hat capital during the prewar period as well as during the taxable year. Space for such a retu
fill is provided on this form.

If the corporation prefers, it may compute the deduction at the rate of 7 per cent and av
the necessity of rendering a return of invested capital for the prewar period. In any case b
he average amount of invested capital during the taxable year must be determined if possib
17. **6. Invested capital.**—For definition of "invested capital" and complete instructi
its for computing its amount see Excess Profits Tax Regulations, Articles 42 to 65.

7. Computation of tax for fiscal year, part of which falls in the calendar y
is **1917.**—The tax of a corporation whose fiscal year differs from the calendar year shall be th
lso proportion of the tax computed on the net income for the fiscal year which the number
months from January 1, 1917, to the end of the fiscal year bears to the entire number of mon
ith in the fiscal year.

ble **8. Corporations making claim for assessment under Article 52** of the Regulati
he (section 210 of the act of October 3, 1917) should answer all questions and fill all sched
so far as possible and attach a statement explaining why it is impracticable or in the cas
lar foreign corporations, unreasonably expensive to fill out the entire return.

BLE YEAR SUBJECT TO EXCESS PROFITS TAX.

			$ 76 361 2	
by corporation in excess of $5,000 par value			none	
			76 361 2	
	$ none			
of obligations reported in item 2, above	none			
			$ 76 361 2	

—INVESTED CAPITAL.

14 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION CO., Plaintiff,

against

UNITED STATES OF AMERICA, Defendant.

Now comes the defendant by its attorney, the United States Attorney for the Eastern District of New York, and demurs to the complaint herein on the ground:

1. That it appears upon the face of the said complaint that the complaint does not state facts sufficient to constitute a cause of action.

2. That the complaint does not set out facts sufficient to constitute a cause of action against the defendant named herein.

3. That this Court has no jurisdiction of this defendant.

Wherefore, defendant asks judgment in this Court that the complaint herein be dismissed, with costs.

LEROY W. ROSS,
United States Attorney for the Eastern District of New York and Attorney for Defendant.

I hereby certify that the above demurrer is not interposed for delay and, in my opinion, the same is well founded in point of law.

Dated Brooklyn, New York, this 8th day of January 1920.

LEROY W. ROSS,
United States Attorney and Attorney for Defendant.

[Endorsed:] Demurrer. Filed Jan. 8, 1920.

15 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

SIR:

Please Take Notice that the issue of law arising upon the petition of the plaintiff herein and the demurrer on the part of the defendant will be brought on for hearing as contested motion at a stated term of the United States District Court, Eastern District of New York appointed to be held at the Post Office Building, Brooklyn,

N. Y. on the 28th day of April 1920 at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated April 15th, 1920.

Yours &c.,

P. L. HOUSEL,
Attorney for the Plaintiff.

Riverhead, N. Y.

To Hon. Leroy W. Ross, United States Attorney, Brooklyn, N. Y.

[Endorsed:] Notice of Motion. Filed Apr. 28, 1920.

16 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION CO.,

vs.

THE UNITED STATES.

IRA M. YOUNG

vs.

THE UNITED STATES.

Percy L. Housel, for plaintiff, for motion.
Leroy W. Ross, for defendant, opposed.

Nov. 18, 1920.

These are two actions, each to recover an amount of Excess Profits Tax paid by the plaintiff under the Revenue Act approved October 3rd, 1917; plaintiff claims that the regulations adopted by the Treasury Department, under which the tax was paid, go beyond the plain intent and meaning of the law. The cases come before the Court on demurrers, which involve the same questions of law and are on the following grounds:

1. That it appears upon the face of the said complaint that the complaint does not state facts sufficient to constitute a cause of action.

2. That the complaint does not set out facts sufficient to constitute a cause of action against the defendant named herein.

3. That this Court has no jurisdiction of this defendant.

Only the first two need be considered, the defendant having abandoned the third.

It is contended, first, that the complaint is insufficient because it does not allege that the taxes were paid under protest and duress before a cause of action arose. The Statute (Section 252, Revenue Act of 1918) provides:

"That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1919, entitled 'An Act
17 to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' the Act of October 3, 1913, entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war profits or excess profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war profits or excess profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer; Provided, that no such credit of refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer."

Under the Act, therefore, the refund is a matter of right without proof of duress or protest. It has been so held under a similar statute. U. S. vs. Hvoslef, 237 U. S. 1.

Even if it were necessary to plead duress or protest, the petition or complaint sets forth that the defendant computed the tax under compulsion of the regulations and filed a claim for abatement of the taxes assessed before payment. This complies with every requisite of a payment under protest. Chesebrough v. U. S. 192 U. S. 253, City of Philadelphia v. Collector, 5 Wall. 720. The Government urges that it is necessary to make a protest at the time of actual payment, but it seems to the Court that this would be a useless requirement. The objects of the protest are to define the taxpayer's attitude and to notify the government thereof. These have been fully accomplished by the objection of the taxpayer when the computation was made and by the filing of his claim.

The second ground of demurrer brings us to the consideration of whether the method of computing the tax was proper. Section 201 of the Revenue Act of 1917, which does not appear to have been judicially construed, reads as follows:

"That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income;

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

18 "Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital;"

Under Articles 16 and 17 of Regulations No. 41 issued by the Commissioner of Internal Revenue, which describe in detail the method of computing the excess profits tax, the deductions have been made, not from the net income before the computation of the tax, but as a part of the computation. These Articles have no binding force if they alter, amend or extend the Statute. Morrill vs. Jones, 106 U. S. 466. It is necessary therefore to consider the language of the Act, in order to ascertain what was intended by Congress.

According to Section 201 of the Revenue Act of 1917, supra a tax is imposed at the rate of 20% upon "the amount of the net income in excess of the deduction and not in excess of fifteen per centum of the invested capital for the taxable year" etc. While the entire section is not free from ambiguity, the Court is of the opinion that, having in mind the necessity of adopting a construction in accordance with the intent of congress when the Act was adopted, that urged by the Government must prevail. If it had been the purpose of Congress to have the tax computed as plaintiff contends, the first paragraph of Section 201 would have provided for the levy of a tax "equal to the following percentages of the net income less the deduction determined as hereinafter provided," making no mention of any deduction in the following paragraph.

If the section as it now reads is carefully analyzed, it is apparent that the amount of the net income which is to be taxed at the rate of 20% is not more than fifteen per cent of the invested capital for the taxable year. But not so much of the net income as
19 is represented by such fifteen per cent is to be so taxed because there must first be allowed the deduction.

The following computation in the case of the Greenport Basin & Construction Company Tax, under Regulations No. 41, shows how the actual wording of the Act is followed under Regulations No. 41 which are here under attack.

Greenport Case.

Computation of Greenport Basin & Construction Company Tax Under Regulations No. 41.

Invested Capital	$215,615.55	Deduction estimated as follows:	
Income	76,361.20	7% of $215,615.55=	$15,093.08
Deduction	18,093.08	Specific deduction=	3,000.00
			$18,093.08

Schedule IV.

Classes of Income.

Over.	But not over income.		Deduction.		Balance rate, subject to tax.	Amount of tax.
1	2	3	4	5	6	7
$0.00	15% inv. cap.	$32,342.33	$18,093.08	$14,249.25	20%	$2,849.85
15% inv. cap.	20% " "	10,780.77	None	10,780.77	25%	2,695.19
20% " "	25% " "	10,780.77	None	10,780.77	35%	3,773.27
25% " "	33% " "	17,249.24	None	17,249.24	45%	7,762.15
33% " "	.....	5,208.09	None	5,208.09	60%	3,124.85
Total		$76,361.20				$20,205.31

Pro rate for fiscal year: 5/6 of $20,205.31=$16,837.76.

It is interesting to note, also, that as Congress continued to enact legislation designed to raise monies for war purposes, the language employed became more specific. That part of the Revenue Act of 1918 which fixed the rates of the tax upon the percentages of the net income is worded substantially like the Act under consideration, but has an additional paragraph which reads as follows:

"(*d*) In any case where the full amount of the excess profit credit is not allowed under the first bracket of subdivision (*a*) or (*b*), by reason of the fact that such credit is in excess of 20 per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket."

While it is quite true that this is not controlling upon the construction of the Act now before the Court, it illustrates admirably how it would be quite possible for the full amount of the excess profit credit to be in excess of fifteen per centum of the invested capital, in which event no provision would be made for allowing that part of the credit so in excess, under the law of 1917.

20 If the foregoing conclusions are correct, the demurrers must be sustained.

(Sgd.) EDWIN L. GARVIN,
U. S. D. J.

[Endorsed:] Opinion.

21 At a Stated Term of the United States District Court for the Eastern District of New York, Held at the Post Office Building in the Borough of Brooklyn, City of New York, on the 18th Day of December, 1920.

Present: Hon. Edwin L. Garvin, District Judge.

THE GREENPORT BASIN AND CONSTRUCTION COMPANY, Plaintiff,

against

UNITED STATES OF AMERICA, Defendant.

The above entitled action having duly come on before me at a term of this Court upon the demurrer interposed by the defendant to the complaint of the plaintiff herein, and the matter having been argued by Mr. Percy L. Housel, attorney for plaintiff, and Charles J. Buchner, Assistant United States Attorney, attorney for defendant, and due deliberation having been had thereon,

Now, on motion of Leroy W. Ross, United States Attorney for the Eastern District of New York, it is,

Ordered, adjudged and decreed that the demurrer in the above entitled action be, and the same hereby is sustained, and it is,

Further ordered, adjudged and decreed that the complaint of the plaintiff be, and the same hereby is dismissed with costs to the defendant to be taxed.

EDWIN L. GARVIN,
U. S. D. J.

22 United States District Court, Eastern District of New York.

GREENPORT BASIN AND CONSTRUCTION COMPANY, Plaintiff,

against

UNITED STATES OF AMERICA, Defendant.

The above entitled action having duly come on before the Honorable Edwin L. Garvin, United States Judge, upon the demurrer interposed by the defendant to the complaint of the plaintiff herein, and the matter having been argued by Percy L. Housel, Attorney for plaintiff and Charles J. Buchner, Special Assistant United States Attorney, as counsel for the defendant, and the said Judge having decided that the demurrer should be sustained, and having, on the 18th day of December, 1920, made an order directing that the demurrer be sustained, and the complaint of the plaintiff be dismissed with costs to be taxed,

Now, on motion of Leroy W. Ross, United States Attorney for the Eastern District of New York, attorney for the defendant, it is,

Adjudged that the complaint of the plaintiff be, and the same hereby is dismissed, and it is further

Adjudged that the defendant, United States of America recover from the plaintiff, the Greenport Basin and Construction Company, the sum of Twenty-three ($23.00) dollars, costs and disbursements as taxed and the defendant have execution therefor.

Dated February 4th, 1921.

By the Court.

PERCY G. B. GILKES,
Clerk,

By J. G. COCHRAN,
Deputy Clerk.

[Endorsed:] Order. Filed and entered December 18, 1920.

23 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant.

On reading of the petition of Greenport Basin & Construction Company for a writ of error and the assignments of error and prayer for reversal and upon due consideration of the record of said cause,

It is Ordered that a writ of error be allowed from the Supreme Court of the United States to the District Court of the United States for the Eastern District of New York as prayed for in said petition

and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error Greenport Basin & Construction Company give security in the sum of $250.00 that the said plaintiff in error shall prosecute said writ of error to effect and if said plaintiff in error fails to make its plea good, shall answer to the defendant in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiff in error now presenting a bond in the sum of $250.00 with the United States Fidelity & Guaranty Company as surety.

It is Ordered that the said bond be and hereby is approved.

In Witness Whereof I have hereunto set my hand this 5th, day of February 1921.

EDWIN L. GARVIN,
U. S. District Judge.

24 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant.

To the Honorable Edwin L. Garvin, U. S. Judge:

The petition of Greenport Basin & Construction Company a corporation organized under the Laws of the State of New Jersey and having its principal place of business at Greenport, Suffolk County in the Eastern District of New York respectfully shows.

1. Heretofore and on or about the 18th, day of December 1919, this action was commenced in this Court upon the petition of the plaintiff above named appearing herein by Percy L. Housel its attorney which petition was duly served upon the Attorney General of the United States and upon the United States Attorney for the Eastern District of New York and proof thereof filed in the office of the Clerk of this Court as required by statute.

2. That subsequently thereto the defendant appearing herein by Leroy W. Ross, its attorney filed a demurrer to the Petition or complaint of the plaintiff above named.

3. Thereafter upon motion by the plaintiff the issue of law raised by the said demurrer was brought on for trial as a contested motion before a Term of this Court held at the United States Post Office and Court House Building, Borough of Brooklyn, City of New York on the 28th, day of April 1920.

4. Thereafter on November 18th, 1920, the Court handed down a decision sustaining the demurrer and directing that judgment be entered dismissing the complaint or petition and such judgment was thereafter entered on the 4th, day of February 1921, whereby it was adjudged that the demurrer to the complaint be sustained and that the complaint be and the same was dismissed with Twenty-three Dollars costs in favor of the defendant and against the plaintiff.

5. The plaintiff conceives itself aggrieved by the said decision and judgment sustaining the demurrer aforesaid and dismissing the complaint herein and also insofar as it failed to overrule the demurrer and to grant judgment to the plaintiff as demanded in the complaint, and as by the assignments of errors hereto annexed.

6. That this action involves a claim against the United States exceeding the sum of $3,000.00.

Wherefore petitioner prays that a writ of error may issue and that it may be allowed to bring up for review before the Supreme Court of the United States the said judgment of this Court sustaining the demurrer aforesaid and dismissing the complaint and that petitioner may have such other and further relief as may be just and your petitioners will ever pray &c.

PERCY L. HOUSEL,
Attorney for Plaintiff.

Office & Post Office Address, Riverhead, N. Y.

United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant.

The plaintiff for the errors committed by the Court in entering a decision and judgment herein dated February 4th, 1921, sustaining the defendant's demurrer to the complaint herein and dismissing the complaint with costs assigns as follows:

1. That said decision and judgment are erroneous in refusing and failing to overrule the demurrer on all the grounds set forth in said demurrer.

2. That said decision and judgment are erroneous in sustaining the demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant therein named and on the ground that the complaint does not state facts sufficient to constitute a cause of action and in dismissing the complaint with costs.

3. That said decision and judgment are in error in findng and holding that the method for computing the tax upon excess profits enforced by the Commissioner of Internal Revenue under the Revenue Act of 1917 was valid and in accordance with the Revenue Act of 1917 and in holding that by reason thereof the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars collected from and paid by the plaintiff herein as part of said excess profits tax under the Revenue Act of 1917, was legally and properly collected.

4. That said decision and judgment are in error in holding that the defendant is entitled to retain the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars, for part
27-31 of the excess profits tax collected from and paid by the plaintiff herein under the compulsion of the regulations of the Treasury Department Article 16 and 17 of Regulations No. 41. under the Revenue Act of 1917.

5. That said judgment and decision are in error in failing and refusing to award judgment to the plaintiff against the defendant for the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars and interest from June 13th, 1918, for the amount of excess profits tax paid by the plaintiff under the Revenue Act of 1917 under the compulsion of the regulations aforesaid in excess of the amount due from the plaintiff for such excess profits tax under and as authorized by the said Revenue Act to be so collected from the plaintiff.

PERCY L. HOUSEL.
Attorney for Plaintiff in Error.

Riverhead, N. Y.

32 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff.

vs.

UNITED STATES, Defendant.

To the Honorable Edwin L. Garvin, United States Judge:

The petition of Greenport Basin & Construction Company a corporation organized under the Laws of the State of New Jersey and having its principal place of business at Greenport, Suffolk County in the Eastern District of New York respectfully shows.

1. Heretofore and on or about the 18th day of December 1919, this action was commenced in this Court upon the petition of the plaintiff above named appearing herein by Percy L. Housel its attorney which petition was duly served upon the Attorney General of the United States and upon the United States Attorney for the Eastern District of New York and proof thereof filed in the office of the Clerk of this Court as required by statute.

2. That subsequently thereto the defendant appearing herein by Leroy W. Ross, its attorney filed a demurrer to the Petition or complaint of the plaintiff above named.

3. Thereafter upon motion by the plaintiff the issue of law raised by the said demurrer was brought on for trial as a contested motion before a Term of this Court held at the United States Post Office and Court House Building, Borough of Brooklyn, City of New York on the 28th day of April 1920.

4. Thereafter on November 18th, 1920 the Court handed down a decision sustaining the demurrer and directing that judg-
33 ment be entered dismissing the complaint or petition and such judgment was thereafter entered on the 4" day of February 1921, whereby it was adjudged that the demurrer to the complaint be sustained and that the complaint be and the same was dismissed with Twenty-three Dollars, costs in favor of the defendant and against the plaintiff.

5. The plaintiff conceives itself aggrieved by the said decision and judgment sustaining the demurrer aforesaid and dismissing the complaint herein and also insofar as it failed to overrule the demurrer and to grant judgment to the plaintiff as demanded in the complaint.

6. That this action involves a claim against the United States exceeding the sum of $3,000.00.

7. That plaintiff hereby appeals from said judgment to the Supreme Court of the United States upon the assignments of error annexed and prays that its appeal be allowed and that a citation issue and that a transcript of the record and proceedings upon which said judgment was made be duly authenticated and sent to the Supreme Court of the United States.

Dated Riverhead, N. Y. February 4th, 1921.

PERCY L. HOUSEL,
Attorney for Appellant.

And now to wit on February 5th, 1921,

It is ordered that the appeal be allowed and that citation issue as prayed for upon appellants filing a bond in the sum of Two hundred fifty ($250) Dollars as security for costs and damages.

EDWIN L. GARVIN,
United States District Judge.

34 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff,

vs.

THE UNITED STATES, Defendant.

The plaintiff for the errors committed by the Court in entering a decision and judgment herein dated February 4th, 1921, sustaining the defendant's demurrer to the complaint herein and dismissing the complaint with costs assign as follows:

1. That said decision and judgment are erroneous in refusing and failing to overrule the demurrer on all the grounds set forth in said demurrer.

2. That said decision and judgment are erroneous in sustaining the demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant therein named and on the ground that the complaint does not state facts sufficient to constitute a cause of action and in dismissing the complaint with costs.

3. That said decision and judgment are in error in finding and holding that the method for computing the tax upon excess profits enforced by the Commissioner of Internal Revenue under the Revenue Act of 1917 was valid and in accordance with the Revenue Act of 1917 and in holding that by reason thereof the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars collected from and paid by the plaintiff herein as part of said excess profits tax under the Revenue Act of 1917, was legally and properly collected.

4. That said decision and judgment are in error in holding that the defendant is entitled to retain the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars for part
35 & 36 of the excess profits tax collected from and paid by the plaintiff herein under the compulsion of the regulations of the Treasury Department Article 16 and 17 of Regulations No. 41. under the Revenue Act of 1917.

5. That said judgment and decision are in error in failing and refusing to award judgment to the plaintiff against the defendant for the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars and interest from June 13th, 1918, for the amount of excess profits tax paid by the plaintiff under the Revenue Act of 1917 under the compulsion of the regulations aforesaid in excess of the amount due from the plaintiff for such excess profits tax under and as authorized by the said Revenue Act to be so collected from the plaintiff.

PERCY L. HOUSEL,
Attorney for Appellant.

Riverhead, N. Y.

37 United States District Court, Eastern District of New York.

GREENPORT BASIN & CONSTRUCTION CO., Plaintiff,

vs.

UNITED STATES, Defendant.

The President of the United States of America to the Judges of the District Court of the United States for the Eastern District of New York, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you or some of you between Greenport Basin & Construction Company, plaintiff and The United States, defendant a manifest error hath happened to the damage of the Greenport Basin & Construction Company as is said and appears by its complaint, We being willing that such error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid and all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same at the City of Washington before the Supreme Court of the United States to be there held on the 7th, day of March 1921, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

38-44 Witness the Hon. Edward D. White, Chief Justice of the Supreme Court, of the United States this 5th, day of February in the year of our Lord One thousand nine hundred and twenty one and of the independence of the United States the one hundred and forty fifth.

[L. S.]

PERCY G. B. GILKES,
Clerk of the District Court of the United States for the Eastern District of New York,
By J. G. COCKRAN,
Deputy Clerk.

The foregoing writ is hereby allowed.

EDWIN L. GARVIN,
United States District Judge.

[Endorsed:] Writ of error. Filed Feb. 5, 1921.

45 Supreme Court of the United States.

GREENPORT BASIN & CONSTRUCTION COMPANY, Appellant and Plaintiff in Error,

vs.

THE UNITED STATES, Appellee and Defendant in Error.

Statement of Points Relied on by Appellant and Plaintiff in Error.

Appeal from and error to the District Court of the United States for the Eastern District of New York.

The appellant and plaintiff in error by Percy L. Housel, its attorney presents the following statement of errors upon which appellant and plaintiff in error intends to rely in the above case and of the parts of the record which appellant and plaintiff in error considers necessary for the consideration thereof.

Errors.

1. That said decision and judgment are erroneous in refusing and failing to overrule the demurrer on all the grounds set forth in said demurrer.

2. That said decision and judgment are erroneous in sustaining the demurrer to the complaint on the ground that the complaint does state facts sufficient to constitute a cause of action against the defendant therein named and on the ground that the complaint does not state facts sufficient to constitute a cause of action and in dismissing the complaint with costs.

3. That said decision and judgment are in error in finding and holding that the method for computing the tax upon excess profits enforced by the Commissioner of Internal Revenue under the Revenue Act of 1917 was valid and in accordance with the Revenue Act of 1917 and in holding that by reason thereof the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars collected from and paid by the plaintiff herein as part of
46 said excess profits tax under the Revenue Act of 1917, was legally and properly collected.

4. That said decision and judgment are in error in holding that the defendant is entitled to retain the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars, for part of the excess profits tax collected from and paid by the plaintiff herein under the compulsion of the regulations of the Treasury Department Article- 16 17 of Regulations No. 41. under the Revenue Act of 1917.

5. That said judgment and decision are in error in failing and refusing to award judgment to the plaintiff against the defendant

for the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars and interest from June 13th, 1918, for the amount of excess profits tax paid by the plaintiff under the Revenue Act of 1917 under the compulsion of the regulations aforesaid in excess of the amount due from the plaintiff for such excess profits tax under and as authorized by the said Revenue Act to be so collected from the plaintiff.

The appellant and plaintiff in error also states that it considers the following parts of the record necessary for the consideration of the errors upon which it intends to rely to wit,

1. The petition of the appellant verified December 15th, 1919 filed December 18th, 1919, together with the exhibits thereto annexed.

2. Demurrer of the appellee and defendant in error dated January 8th, 1920.

3. Plaintiff's notice of motion of trial of the issue of law as a contested motion.

4. Opinion of Hon. Edwin L. Garvin, United States Judge, upon the decision of the demurrer.

5. Order entered December 18th, 1920, sustaining the demurrer.

6. Judgment entered February 4th, 1920, dismissing the complaint.

7. Petition for appeal, assignments of error and order allowing appeal.

47 8. Petition, assignments of error and order allowing writ of error.

9. Writ of error.

Respectfully Submitted,

PERCY L. HOUSEL,
Attorney for Appellant and Plaintiff in Error.

Riverhead, N. Y.

48 [Endorsed:] 755—28112. Supreme Court of the United States. Greenport Basin & Construction Company, Appellant and Plaintiff in Error, vs. The United States, appellee and defendant in error. Original Statement under Rule 10. Percy L. Housel, Attorney for plaintiff. Office and P. O. Address, Riverhead, New York.

STATE OF NEW YORK,
County of Suffolk, ss:

Helen M. Newton being duly sworn deposes and says that she is over the age of 21 years; that on the 23 day of February 1921, she served a copy of the within Statement Under Rule 10 on Leroy

W. Ross, United States Attorney, by depositing in the Post Office at Riverhead, N. Y. a true copy thereof securely enclosed in a post paid wrapper directed to Hon. Leroy W. Ross, U. S. Attorney, 211 Federal Building, Brooklyn, N. Y. that being the true post office address of said U. S. Attorney.

HELEN M. NEWTON.

Sworn to before me this 24 day of February 1921.

[Seal of John S. Howe, Notary Public, Suffolk County, N. Y.]

JOHN HOWE.
Notary Public, Suffolk County, N. Y.

[Endorsed:] File No. 28,112. Supreme Court U. S. October Term, 1920. Term No. 755. Greenport Basin & Construction Co., Appellant and plaintiff in error, vs. The United States. Statement of points to be relied upon and designation by plaintiff in error and appellant of parts of record to be printed. Filed Feb. 25, 1921.

Endorsed on cover: File No. 28,112. E. New York, D. C. U. S. Term No. 755. Greenport Basin & Construction Company, Plaintiff in Error and appellant, vs. The United States. Filed February 24th, 1921. File No. 28,112.

To the Honorable the Supreme Court of the United States:

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

And now comes Greenport Basin & Construction Company the plaintiff in error and prays for a reversal of the judgment of the District Court of the United States for the Eastern District of New York in the action brought by Greenport Basin & Construction Company, plaintiff against the United States defendant which judgment sustained a demurrer to the complaint and dismissed the complaint with costs and was entered in the office of the Clerk of the United States District Court, Eastern District of New York, on or about the 4th day of February 1921.

PERCY L. HOUSEL,
Attorney for Greenport Basin & Construction Company.

Office & Post Office Address, Riverhead, N. Y.

To the Honorable the Supreme Court of the United States:

GREENPORT BASIN & CONSTRUCTION COMPANY, Appellant,

vs.

UNITED STATES, Respondent.

And now comes Greenport Basin & Construction Company, appellant and prays for a reversal of the judgment of the District Court of the United States for the Eastern District of New York in the action brought by Greenport Basin & Construction Company, plaintiff, against the United States, defendant, which judgment sustained a demurrer to the complaint and dismissed the complaint with costs and was entered in the office of the Clerk of the United States District Court, Eastern District of New York on or about the 4th day of February, 1921.

PERCY L. HOUSEL,
Attorney for Greenport Basin & Construction Company.

Office & Post Office Address, Riverhead, N. Y.

Supreme Court of the United States, October Term, 1921.

No. 231.

GREENPORT BASIN & CONSTRUCTION COMPANY, Plaintiff in Error and Appellant,

vs.

THE UNITED STATES, Defendant in Error and Appellee.

It is Hereby Stipulated and Agreed that the prayer for reversal annexed to the assignment of error and petition for writ of error and likewise annexed to the petition for allowance of appeal, heretofore omitted from the printed transcript of the record herein, be printed and inserted in the record by the Clerk of this court at the expense of the plaintiff in error and appellant.

Dated January 9th, 1922.

M. HAMPTON TODD,
PERCY L. HOUSEL,
Attorney- for Plaintiff in Error and Appellant.
JAMES M. BECK,
Solicitor General.

[Endorsed:] 231, October Term, 1921. Supreme Court of the United States. Greenport Basin and Construction Company, Plaintiff in Error, vs. The United States, Defendant in Error. Stipulation for printing prayer for reversal as part of the transcript of the Record. Housel, Todd, for Pl'ff in Error. Beck, for Def't in Error.

[Endorsed:] File No. 28,112. Supreme Court U. S., October Term, 1921. Term No. 231. Greenport Basin & Construction Co., Plaintiff in Error and Appellant, vs. The United States. Stipulation and addition to record. Filed Jan. 24, 1922.

Supreme Court of the United States,

OCTOBER TERM, 1921.—No [redacted]31

GREENPORT BASIN & CONSTRUCTION COMPANY,

Petitioner Plaintiff in Error and Appellant,

vs.

THE UNITED STATES,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

PERCY L. HOUSEL,
M. HAMPTON TODD,
Of counsel for Plaintiff in Error and Appellant.

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TABLE OF CASES

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vs.

THE UNITED STATES,

Defendant in Error and Appellee.

IN ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF IN ERROR AND APPELLANT.

In error to and appeal from the District Court of the United States for the Eastern District of New York.

Brief of Plaintiff in Error and Appellant.

This cause comes before the Court upon writ of error and appeal of the plaintiff corporation from a judgment dismissing the complaint upon demurrer thereto.

The petition (complaint) sets forth a cause of action to recover $4420.40 with interest from June 13, 1918, for illegal excess profits tax under the Act of October 3, 1917, assessed against and collected from the plaintiff, and not refunded on claims for abatement and refund duly filed more than six months before the action,

and not acted upon by the Commissioner of Internal Revenue.

The defendant demurred upon the grounds, *inter alia*, that the complaint did not state facts sufficient to constitute a cause of action, against the defendant, (page 7 of the record) and on this ground was sustained and judgment was entered dismissing the complaint (page 13 of the Record).

The appeal presents for adjudication the validity of Treasury Regulations No. 41, Articles 16 and 17, Treasury Department Form No. 1103, under the Revenue Act of October 3, 1917, sections 201 and 203, and the true construction of the sections cited.

QUESTIONS INVOLVED.

First:—Whether under the provisions of the revenue act of October 3, 1917, imposing a war excess profits tax on the net income of a corporation, the deduction allowed shall first be deducted from the net income and the graduated tax applied to the residue or,

Second:—Shall the deduction be applied to the net income simultaneously and *pro tanto* with the ascertainment of the several classes of profits as related to invested capital, which are subject to the graduated tax.

Third:—Whether the demurrer should not have been overruled and judgment ordered for the plaintiff for the sum demanded in the complaint.

STATEMENT OF THE CASE.

The question to be determined in this case is the construction of Section 201 of the Act of Congress of

October 3d, 1917, Statutes at Large 1917, page 300, imposing the War Excess Profits Tax.

The relevant language of the act is as follows:

"Title II. War Excess Profits Tax."

Page 302: Definitions:

"The term 'taxable year' means the twelve months ending December thirty-first, excepting in the case of a copartnership or corporation which has fixed its own fiscal year in which case it means such fiscal year."

Page 303:

"The term 'prewar period' means the calendar years nineteen hundred and eleven, nineteen hundred and twelve, and nineteen hundred and thirteen."

"Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income;

Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

Page 304:

"Sec. 203: That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business duruing the pre-war period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3000;"

The plaintiff in error and appellant contends that in computing the tax the "deduction" allowed by the statute must first be deducted from the net income and the graduated tax imposed upon the balance. The defendant in error contends that the deduction allowed by the statute must be applied simultaneously with the ascertainment of the several classes of the net income subject to the graduated tax.

The result of the defendant's construction in this case was to compel the plaintiff to pay a tax of $4420.40 in excess of the amount due under plaintiff's construction of the law. All requisite claims for abatement

and refund were filed, and sufficient time was allowed to elapse for action thereon, which was never taken, to bring the case within the provisions of the law permitting actions for the recovery of illegally collected taxes.

The facts stand undisputed and as alleged in the petition or complaint. (Pages 1 to 7 of the Record).

They show that plaintiff, a domestic corporation, on March 26, 1918, filed with the collector of internal revenue for the proper district, upon the forms prescribed by the Treasury Department, an excess profits tax return for the taxable year ending October 31, 1917, and, under the compulsion of the regulations of the Commissioner of Internal Revenue, computed an excess profits tax thereon of $16,837.76 and thereafter paid the same; that in due order plaintiff filed an appeal to the Commissioner of Internal Revenue and a claim for abatement of the tax and, after payment, a claim for a refund of $4420.40 on the ground that the Treasury Regulations No. 41, Articles 16 and 17, and Form No. 1103, regulating the manner of deducting the allowed deduction, and the manner of computing and levying the excess profits tax prescribed thereby, were contrary to the law, and that the correct tax due from plaintiff under a proper application of the law to the data of the tax year was less by $4420.40 than the amount exacted and paid; that more than six months elapsed since filing said appeal and claims for abatement and refund, and that the Commissioner of Internal Revenue had not rendered a decision on either and that no refund had been made. Copies of the excess profits tax return (pp 6 and 7 insert of transcript) appeal and claim for abatement (p 5 of tran-

script, and claim for refund (p 6 of transcript insert) were annexed to and made part of the plaintiff's pleading. It is further alleged that under the true intent and meaning of the law the entire amount due for excess profits tax in the fiscal or tax year in question was a sum less by $4420.40 than the sum exacted and paid, and that the Treasury Department Regulations and form above cited are contrary to the law in that they applied the excess profits tax to all net income, allowing the statutory deduction to be taken only from the profits amounting to 15% of the invested capital calculated from the beginning of profits, and so on, instead of first deducting the allowed deduction from the entire sum of net profits, and thereafter applying the graduated tax rate to such residue of profits, segregated into the 15%, 20%, 25% and 33% classes and so on, and that the exaction and collection of the sum aforesaid from the plaintiff was, so far as it exceeded $12,417.36, wholly contrary to law and hence illegal and void and should be abated and refunded.

The excess profits tax return annexed to the petition showed the following data for the tax:—

Invested capital - - -	$215,615.55
Net profits for fiscal year ending Oct. 31, 1917 - - -	76,361.20
7% deduction elected - -	15,093.08
Add exemption by statute - -	3,000.00
Total exemption or deduction -	18,093.08

The regulations required the deduction to be disposed of thus:

Invested capital	Income	Deduction	Subject to tax.	rate	tax.
0 o 15%	$32342.33	$18093.08	$14,249.25	20%	20,49.85
15 to 20%	10780.77	none	10,780.77	25%	2695.19
20 to 25%	10780.77	none	10,780.77	35%	3773.27
25 to 33%	17249.24	none	17,249.24	45%	7762.15
33% up	5208.09	none	5,208.09	60%	3124.85
	$76361.20				$20205.31
Proportion taxable to Oct. 31, 1917 - -					16837.76

The claim for abatement and refund assert the following to be the correct and legal disposition of the deduction,

Net Profits - - -	$76361.20
Deduction, - - -	18093.08
Balance over deduction and subject to tax - - -	$58268.12

Distributed in the classes above.			Tax
15%	$32342.33	at 20%	$6468.47
5%	10780.77	25%	2695.19
5%	10780.77	35%	3773.25
8%	4364.25	45%	1963.91
over 35%	none		
Total - - - -			$14900.82
Proportion taxable to Oct. 31, 1917			$12417.36

The difference is that the Treasury rule throws into the 45% tax class the sum of $17249.24 instead of $4364.25, and in the 60% class $5208.09 instead of nothing. That is, an amount exactly equalling the deduction is forced into the higher tax brackets by the

application of the rule enforced by the Treasury, in first separating the profits into the various brackets of 15%; 15 to 20; &c., instead of first deducting from the total profits the statutory deduction, and casting the residue into the various tax brackets.

The similar case of Ira M. Young against the United States was tried and decided with the instant case. It is not before this Court because the amount involved did not admit of an appeal to this nor any other Court. But the facts may be referred to to illustrate the result achieved by the regulations.

Mr. Young was subject to the excess profits tax because engaged in a business with invested capital.

His capital amounted to - -		$35770.87
His profits were - - -		11637.82
His deduction was 7%	$2503.96	
Salary	2500.00	
Specific exemption,	6000.00	
Total deduction	$11003.96	11003.96
Balance subject to tax of 20% on our theory		$633.86
The tax on our theory should have been		$126.78

But the Treasury Regulations compelled this distribution and tax:

Class	Income	Deduction	Subject to tax.	Rate	Tax.
0-15%	$ 5365.63	$ 5365.63	none	20%	none.
15-20	1788.54	1788.54	none	25%	none.
20-25	1788.54	1788.54	none	35%	none.
25-33	2695.11	2061.25	633.86	45%	285.24
	$11637.82	$11003.96	$633.86		$285.24

This furnishes an illustration of the operation of the regulation whereby, from the entirely accidental and irrelevant relation between invested capital on the one hand, and salary, specific deduction and 7% of the invested capital on the other hand, the excess of profits over the deduction is forced into the next to the highest tax bracket, with no real or substantial reason, in the nature of the business or the volume of business or profits to justify imposition, in the first instance, of the fourth ascending rate of tax, instead of the first.

ASSIGNMENT OF ERRORS.

1. That said decision and judgment are erroneous in refusing and failing to overrule the demurrer on all the grounds set forth in said demurrer.

2. That said decision and judgment are erroneous in sustaining the demurrer to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendant therein named and on the ground that the complaint does not state facts sufficient to constitute a cause of action and in dismissing the complaint with costs.

3. That said decision and judgment are in error in finding and holding that the method for computing the tax upon excess profits enforced by the Commissioner of Internal Revenue under the Revenue Act Act of 1917, and in holding that by reason thereof the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars collected from and paid by the plaintiff herein as part of said excess profits tax under the Revenue Act of 1917, was legally and properly collected.

4. That said decision and judgment are in error in holding that the defendant is entitled to retain the sum of Four thousand four hundred twenty and 40/100 ($4420.40) Dollars, for part of the excess profits tax collected from and paid by the plaintiff herein under the compulsion of the regulations of the Treasury Department Article 16 and 17 of Regulations No. 41, under the Revenue Act of 1917.

5. That said judgment and decision are in error in failing and refusing to award judgment to the plaintiff against the defendant for the sum of Four thousand four hundred twenty and 40/100 ($4,420.40) Dollars and interest from June 13th, 1918, for the amount of excess profits tax paid by the plaintiff under the Revenue Act of 1917, under the compulsion of the regulations aforesaid in excess of the amount due from the plaintiff for such excess profits tax under and as authorized by the said Revenue Act to be so collected from the plaintiff.

See pages 15, 16 and 18 of the Record.

ARGUMENT.

I.

The statute intends that the deduction be first taken from total net profits and that the graduated tax be applied to the remainder only.

The applicable sections of the Statute, and the Treasury Regulations complained of are printed above and in appendix A. The form of return No. 1103 pre-

scribed by the Treasury is printed in the record (insert at page 6).

This Court in La Belle Iron Works vs United States (U. S. Adv. Ops. 1920-21, page 604) has defined the purpose, intent and meaning of the act:

> "Title 1 of the act imposed "war income taxes" upon individuals and corporations in addition to those imposed by Act of September 8, 1916 (chap. 463, 39 Stat. at L. 756, Comp. Stat. § 6336a, Fed. Stat. Anno. Supp. 1918, p. 312). Title 2 provided for the levying of "war excess profits taxes" upon corporations, partnerships and individuals. As applied to domestic corporations, the scheme of this title was that, after providing for a deduction from income (§ 203, p. 304) equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period (the years 1911, 1912 and 1913) was of the invested capital for that period, but not less than 7 nor more than 9 per cent., plus $3000.00 it imposed (§ 201, p. 303), in addition to other taxes, **a graduated tax upon the net income beyond the deduction, commencing with 20 per centum of such net income above the deduction,** but not above the 15 per centum of the invested capital for the taxable year, and running as high as 60 per centum of the net income in excess of 33 per centum of such capital. It applied to "all trades or businesses", with exceptions not now material (p. 303), and

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Reading the entire language of § 207 in the light of the circumstances that surrounded the passage of the act, we think its meaning as to "invested capital" is entirely clear. The great war in Europe had been in progress since the year 1914, and the manufacture and export of war supplies and other material for the belligerent powers had stimulated many lines of trade and business in this country, resulting in large profits as compared with the period before the war, and as compared with ordinary returns upon the capital embarked. The United States had become directly involved in the conflict in the spring of 1917, necessitating heavy increases in taxation; at the same time manufactures and trade of every description were rendered even more active, and in certain lines more profitable, than before, **so that the unusual gains derived therefrom formed a natural subject for special taxation.**

On the eve of our entry, and in order to provide a "special preparedness fund" for Army, Navy, and fortification purposes, an act (March 3, 1917, chap. 159, 39 Stat. at L. 1000, Fed. Stat. Anno. Supp. 1918, p. 341) was passed, which, in Title 2, provided for an excess profits tax on corporations and partnerships equal to 8 per centum of the amount by which their net income exceeded $5000, plus 8 per centum of the "actual capital invested;" and, in § 202 (p. 1001), defined this term to mean "(1) actual cash paid in, (2) the actual cash value, at the time of payment, of assets other than cash paid in, and (3) paid in or

> earned surplus and undivided profits used or employed in the business," but not to include money or other property borrowed.
>
> The Revenue Act of October 3, 1917, passed after we had become engaged in the war, took the place of the Act of March 3, and embodied a "war excess profits tax," with higher percentages imposed upon the income in excess of deductions, and a more particular definition of terms. **A scrutiny of the particular provisions of 207 shows that it was the dominant purpose of Congress to place the peculiar burden of this tax upon the income of trades and businesses exceeding what was deemed a normally reasonable return upon the capital actually embarked.** But if such capital were to be computed according to appreciated market values based upon the estimates of interested parties (on whose returns perforce the government must in great part rely), exaggerations would be at a premium, corrections difficult, and the tax easily evaded.

We submit that this Court has thus defined the purpose of the law to be,

> "to place the peculiar burden of this tax upon the income of trades and businesses, exceeding what was deemed a normally reasonable return upon the capital actually embarked",

and its incidence as,

> "a graduated tax upon the net income *beyond the deduction* commencing with 20 per centum of such net income above the deduction".

This is the contention of the appellant here, and in the like case pending before the Circuit Court of Appeals in the Second Circuit.—Ehret Magnesia Co. vs Lederer, 273 Fed 689, now awaiting the decision of this case.

This construction follows naturally from,

(1) the situation surrounding the enactment,

(2) the title of the act and the applicable sub title;

(3) the definition of the deduction (§203);

(4) the language of the act applying the deduction and determining the *res* to which the tax shall apply;

(5) the analogies of earlier revenue acts.

But the Treasury Department, now supported by two District Judges in Brooklyn and Philadelphia, holds that the use, in the second clause of the section 201, of the phrase "in excess of the deduction (determined as hereinafter provided)," and its omission in the third and succeeding clauses, operate to require that the profits, pre war as well as war excess profits, be classified from the first cent in the brackets corresponding to 15, 20, 25 and 33% of capital and above, and that the deduction be applied only pro tanto, beginning with the 15% class.

This contention operates to create gross inequalities in the incidence of the tax; it renders illusory in many cases the intent of Congress as discerned by this court; it involves the suppletion of necessary words to accomplish the end contended for and is so grossly foreign to the obvious purpose and intent of the law as to require rigorous demonstration of its correctness be-

fore it should be accepted by this court. We are confident that such a result is impossible, due regard being had to the data above set forth.

The universal practice when a deduction or exemption is allowed is to regard that part of the *res* as wholly without the operation of the law.

Under the income tax laws, in and prior to the act in question, a single person enjoying an income of less than the amount of the exemption applicable to the case was not required to file a return.

The estate tax is a graduated tax imposed upon the net estate, which is determined by subtracting from the gross estate, among other things, an exemption of $50,000, with the result that no gross estate of less than $50,000 is required to take any notice whatsoever of the law.

The capital stock tax of the act of September 8th, 1916, (Statutes at Large, Chapter 463 Page 789,) provides an exemption of $99,000 in the case of domestic corporations, and of a proportionate part thereof in the case of foreign corporations. Every corporation of the class subject to the tax made a return under this act, but no tax attached until the value of the invested capital exceeded the total deduction.

The original excess profits act, of March 3, 1917, (39 Stat. at Large 1000, 201,) attached only to the amount of net profits which exceeded the deduction of $5000 and 8% of actual capital invested.

In the war income tax on individuals under the Act of October 3rd, 1917, the tax attached only to the income remaining after the exemption had been deducted, and persons with an income less than the

amount of the applicable deduction were not required to make a return (§ 3).

In short it is inherent in the terms "deduction" and "exemption", that thereby are reserved or excluded sums to which the tax does not attach, or conversely, that thereby the law designates, for its incidence and concern, only the fund exceeding the deduction or exemption.

Such being the invariable meaning and practice under revenue laws, we make bold to assert that the draughtsmen of the present law had in mind the latter proposition, that the law concerned itself only with the corpus of the fund remaining after the deduction had been set aside, and having taken care to provide for the deduction in the second clause of section 201, proceeded with the third and succeeding clauses intending and believing that, the deduction having been disposed of once for all, it would be plain to all that the succeeding clauses, providing higher taxes, concerned, as in all previous laws, that portion of the corpus remaining for taxation after the deduction had been provided and laid aside, and the initial tax imposed.

This conclusion is fortified by a consideration of the origin and reason of the deduction and the purpose of the tax, which, was to segregate and reach for taxation, the unusual and extraordinary profits due to the war. Such purpose is entirely frustrated unless the tolerated percentage under pre war conditions is, once and for all, determined, subtracted and laid aside from the operation of the law. This being done, the balance remaining is, by legislative interpretation, deemed to be the amount of profits due to war time conditions, and, hence, to come under the operation of the tax.

It was the obvious purpose to tax this residue by a progressive tax proportioned to the *quantum* of the excess over pre war conditions. To that end, it commenced with a 20% tax of a stipulated first bracket of the excess profits, and as the profits increased, so did the tax.

This interpretation follows logically the purpose, meaning and title of the law and results in the largest tax from the largest profit over and above the normal or tolerated return under pre war conditions.

2. If we find, as we shall, that the construction supported by the Treasury Department "will occasion great inconvenience or produce inequality and injustice", the court, under the doctrine declared in Knowlton vs Moore, 178 U. S. 41, 78, will avoid that construction, if another and more reasonable interpretation is present in the statute.

The Treasury Department's construction is obnoxious to this rule,

A.—in defeating the purpose to tax evenly and progressively the profits due solely to war conditions, and properly within the term war excess profits.

B.—in defeating the purpose to exempt an amount of profits reasonably attributable to pre war conditions, but

C.—on the contrary, effecting a taxation of the exemption and that in the higher brackets.

A. IN DEFEATING AN EVEN AND PROGRESSIVE INCIDENCE OF THE TAX.

If the deduction is once taken from the total of net

profits and excluded from subsequent computations, it is apparent that thereby the purpose to exempt pre war profits as represented by the deduction, will have been fully accomplished.

The purpose of the law, as stated above, was to impose "a graduated tax upon the net income beyond the deduction." The tax and the deduction are alike controlled by the percentage of profits to invested capital. The sole classification provided by the law is by reference to the percentage of profits to capital.

It is a percentage tax, pure and simple. It provides for no personal classification and any such classification forced upon the law by regulation is simply void. So any classification defeating the even application of the law, strictly according to its letter, and to percentages of profit only, is an attempt to superimpose a classification not provided by the law and, hence, in conflict with the law.

The regulations complained of do this very thing. By making the deduction a part of the computation of the tax, they introduce an erratic series of taxes, commencing at varying rates, that plainly contravenes the purpose of the statute to impose its burden evenly, beginning with the lowest rate, and based exclusively on war profits as determined by the machinery of the law.

On the government's theory of the application of the deduction as part of the computation, it is obvious that many corporations will be exempt from taxation in the first bracket because the deduction will be equal to the percentage of capital representing the amount of profits taxable in such bracket. Such a result will follow other corporations into the second bracket and so on. It can readily be demonstrated that the inevitable

result, in the case of numerous corporations of small capital, will be to tax a modest percentage of profits in a high or the highest tax bracket. These results will not be even nor equitable, nor will they bear the slightest relation to the dominant purpose of the law to impose the heaviest tax rate upon the largest excess of profits, determined on a percentage basis, over the percentage of profit attributed to prewar conditions.

The following examples of the above, based upon an assumed prewar profit of 9% plus the specific exemption of $3000, illustrate the point:—

Every corporation with invested capital of $50,000 or less, with earnings 15% or less, is exempt, but for its first tax on profits over 15% will pay 25%.

Every corporation with invested capital of $40,000 or less, with earnings 16½% or less is exempt, but for its first tax on profits over 16½% will pay 25%.

Every corporation with invested capital of $30,000 or less, with earnings 19% or less, is exempt, but for its first tax on profits over 19% will pay 25%.

Every corporation with invested capital of $25,000 or less, with earnings 21% or less, is exempt, but for its first tax on profits over 21% will pay 35%.

Every corporation with invested capital of $20,000 or less, with earnings 24% or less, is exempt, but for first tax on profits over 24% pays 35%.

Every corporation with invested capital of $15,000 or less, with earnings 29% or less, is exempt, but for its first tax on profits over 29% pays at 45%.

Every corporation with invested capital of $10,000

or less, with earnings 39% or less, is exempt, but for its first tax on profits over 39% pays 60%.

An entirely separate series will spring from the use of 7% as an element of the deduction, and, obviously, a different result for every fraction between 7% and 9%, the minimum and maximum percentage allowed for pre war earnings.

For each calculated capital, a different minimum tax rate will apply, depending entirely upon the accidental mathematical relations above examined, for all may earn a level percentage of profit and yet be subject to widely varying rates of initial tax, widely varying totals of tax, and equally widely varying proportional relations of total tax to capital.

It seems sufficiently clear from these illustrations that the inequality introduced by the regulations is within the condemnation of the rule stated in Brushaber vs Union Pac. 240 U. S. at page 25, a result "so wanting in basis for classification as to produce such a gross and patent inequality as to lead to the conclusion that it is confiscation and not taxation."

The tax cannot be considered from any standpoint except as a percentage tax,—based upon percentages of earnings, having an exemption or deduction based upon a percentage of capital. Hence no transposition of language into absolute figures, as attempted by Judge Thompson in the Ehret case, (273 Fed 689) to explain or classify what he frankly recognizes as an ambiguity, can be countenanced. It will lead nowhere, as a few examples will demonstrate. The 9% element of the deduction will cause any amount of profit to disappear from the tax if the invested capital is assumed high enough.

So no absolute statement in concrete series can paraphrase the tax. It is a tax on relative earnings, over a deduction of relative earnings attributed to pre war times.

Congress intended the deduction to be referred to the percentage of capital earned in pre war times; to be a percentage figure plus $3000. It is idle to assert that it was the intention to penalize the small corporation by taxing it first in the higher brackets. Nor is it an answer to blame it on the specific deduction. Congress did not intend to give the deduction with one hand, and use it as a basis for a higher tax with the other.

Nor will it answer the objection to say that the above inequalities affect only small corporations. In number, corporations of $50,000 probably compose the largest class. And the same vice applies, *pari passu*, to individuals with invested capital, whose deduction is on the same basis, plus $6000. The number of individuals liable to the tax, with invested capital of $50,000 or less, is probably very large. The inequality imposed upon them by the regulations is of the same amplitude as in the case of corporations.

It is somewhat difficult to state the defendant's construction with accuracy and clearness in a single sentence. It can be best obtained from the illustrations for computing the tax as set forth in the Regulations of the Internal Revenue Department No. 41, Art. 17. There are two illustrations given, one of a corporation, the other of a partnership, but the method governing the computation of the tax is the same in both examples. We quote the illustration in reference to a corporation, which is as follows:

"(1) A corporation has a capital of $9000; prewar earnings of 9 per cent.; and a net income for the taxable year of $10,000.

The deduction allowed will be 9 per cent. of the capital, or $810, plus $3000 specific deduction, a total of $3810.

The amount of the net income in each bracket will be as follows:

15 per cent. of the capital - -	$1,350
In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof - - - - -	450
In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof - - - - -	450
In excess of 25 per cent. of the capital and not in excess of 33 per cent. thereof - - - - -	720
In excess of 33 per cent. of the capital	7,030

It is evident that the total deduction of $3810 is greater than 15 per cent. of the capital and so is not fully absorbed by the amount of net income not in excess of 15 per cent. of the capital. In such case, applying Article 17, the total deduction of $3810 will be distributed as follows:

$1350 in the first bracket, leaving nothing to be taxed at the 20 per cent. rate.

$450 in the second bracket, leaving nothing to be taxed at the 25 per cent. rate.

$450 in the third bracket, leaving nothing to be taxed at the 35 per cent. rate

$720 in the fourth bracket, leaving nothing to be taxed at the 45 per cent. rate.

There still remains $840 of the deduction to be allowed in the fifth bracket against the $7030 of income which would otherwise be taxable under that bracket. There would then be $6190 of net income left to be taxed at the 60 per cent. rate under the fifth bracket. Hence, the total excess profits tax in this case would be $3714."

It will be observed in the example given that no portion of the net income is taxed at either the 20, 25, 35 or 45 per cent. rate, but all of the net income in excess of the deduction is taxed at the 60 per cent. or highest rate.

The plaintiff's contention is that a fair and reasonable interpretation of the language of the Act imposing this tax does not justify such a method of reckoning the tax.

Apply this rule to the case of a corporation with large capital, say $1,500,000; pre war profits of 9 per cent. and net income for the taxable year of $500,000. —under article 17 above cited the tax would be computed as follows:

		Exemption	Balance	
15% Capital	$225,000	less $138,000	$ 87,000 at 20% tax	$ 17,400.
5% "	75,000	no exemp. bal.	75,000 at 25% tax	18,750.
5% "	75,000	no exemp. bal.	75,000 at 35% tax	26,250.
8% "	120,000	no exemp. bal.	120,000 at 45% tax	54,000.
Balance,	5,000	no exemp. bal.	5,000 at 60% tax	3,000.
				$119,400.

A partnership under the same circumstances would work out the same way after making the changes due to the higher specific exemption of $6000.

Thus we have the astonishing result of one taxpayer with a taxable income of $6190 in the illustration given in Regulation No. 41, paying the 60 per cent. rate on all of his taxable income and another taxpayer with a taxable income of $500,000, paying the 20, 25, 35 and 45 per cent. rates on $495,000 of income and paying the 60 per cent. rate on but $5000 of income. Such illustrations could be multiplied indefinitely, but one is as good as a thousand for the purpose of our argument.

The small corporation is taxed 37% of its profits and the large corporation is taxed 23.85% of its profits without any perceptible reason for the discrimination.

The result logically can only be attributed to a deliberate intention to impose the heaviest burden on the small corporation with modest total earnings, and the lightest burden on the large corporation of large earnings without any reference to pre war conditions, while the converse was notoriously the purpose of Congress.

These considerations indicate that the regulations superimpose on the law a classification and discrimination dependent upon the ratio of deduction to capital which finds no warrant in the text of the law, and which, if in the law, would condemn it for violation of fundamentals.

They produce results which are in conflict with "the inherent and fundamental nature and character of a tax" which Congress may lawfully impose, which are "that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax."

> Pollock vs. Farmers' L. & T. Co. 157 U. S. 429, 599.

The results above illustrated cannot be harmonized with the rules stated in the above opinion. They rather come within its condemnation of "trifling differences" made the "ground and occasion of the greatest possible differences in the amount of taxes."

What possible justification can be fancied for the inequalities above demonstrated? There is none in the circumstances leading to the enactment of the law nor in its title nor text. If imported into the text by regulation, it not only violates the rule against departmental legislation, but offends the fundamentals which Congress itself may not transgress.

B. & C. IN DEFEATING THE PURPOSE TO EXEMPT AN AMOUNT OF PROFITS REASONABLY ATTRIBUTABLE TO PRE WAR CONDITIONS AND ON THE CONTRARY EFFECTING A TAXATION OF THE DEDUCTION ITSELF.

That the purpose of the law was to exempt prewar profits has been demonstrated. This Court will, therefore, undoubtedly effectuate that purpose, for it lies

at the basis of the tax. Bernier vs Bernier 147 U. S. 242.

The tax does not attach until that purpose has been effectuated, and, by corollary, only to what is then left; and it is a special and peculiar tax not a common burden imposed upon all. In Re Easton 113 N. Y. 174.

If, therefore, the effect of the regulations is to defeat that purpose, in whole or in part, such regulations must fail, for no department can by regulation add to nor subtract from the legislative act.

Morrill vs Jones, 106 U. S. 466.

It will be obvious from an inspection of a computations of the tax, that the Regulations operate essentially to tax the deduction.

For example, assume an invested capital of $50,000. earnings of 33 1/3% or $16,666; a deduction of 9% plus $3000. or $7500 and the computation will be as follows:—

		Deduction	Subject to tax.	Rate	Tax
15% capital	$ 7500	$7500	none	20	none
5% capital	2500	none	$2500	25	$ 625.00
5% capital	2500	none	2500	35	875.00
8% capital	4000	none	4000	45	1800.00
over 33% capital	166	none	166	60	99.60
	$16666	7500	$9166		$3399.60

The exemption, exactly equalling the profits allocated to the first bracket, leaves no balance subject to the lowest tax. Considered by itself, no tax is laid upon the deduction. But, inasmuch as the deduction is forced into the computation, it necessarily displaces an amount of profits over the deduction and of equal

amount. The mechanical presence of the deduction in the computation forces upward into a higher bracket, a like amount which, but for the deduction, would appear in a lower bracket. And this mechanical displacement continues until the top is reached. It follows, therefore, that the amount of the deduction, $7500., is forced into the 23%, 35% and, in part ($25000), in the 45% class, and by reason of filling the 45% class, in part, displaces $166.00 into the 60% class. Thus, these sums displaced are taxed at a higher rate according to this tible.

$2500.00 at 25% instead of 20%—difference 5% tax		$ 125.00
2500.00 at 35% instead of 20%—difference 15% tax		375.00
2500.00 at 45% instead of 20%—difference 25% tax		625.00
1500.00 at 45% instead of 25%—difference 20% tax		300.00
166.00 at 60% instead of 25%—difference 35% tax		58.10
		$1483.10

It is impossible to argue that the deduction is not actually taxed. It is a component of the computation by which the result is reached. But for its presence the tax on the illustrated profit would be $1916.50 viz:

	Profits	$16,666	
	Deduction	7,500	
	Liable to tax	9,166	
		Tax	
15% class	$7500	20%	$1500.00
5% class	1666	25%	416.50
	$9166		
	Total Tax		$1916.50

The difference is due solely to the presence of the deduction in the computation and is, therefore, in fact, a tax because of, and therefore, on the deduction.

We have shown, as above, that the regulations introduce into the tax a wide variance of the percentage of profits actually exempted by the practical operation of the regulations. Where uniformity was intended by the law, inequality has been introduced by the regulations. The important fact is that Congress made no personal classification of taxpayers and intended none. It intended a percentage classification pure and simple, with only such variances therefrom as the specified deduction effected.

The Regulations defeat the purpose of a level percentage classification, and make a personal classification, dependent upon the accidental relations of deductions, profits and capital by which one earning 33 1/3% on capital is taxed at 60%, and another with the same 33 1/3% of profit is taxed at 20%. In effecting this alone, the Regulations defeat the purpose of Congress, for the result is not a uniform progressive tax, dependent upon the ascending ratio of profits, but one by which, by the accident of ratio, having nothing to do with excess profits, one taxpayer pays tax on the first dollar subject to the tax at the highest rate, while another, with the same ratio of earnings, pays at the lowest rate. This is not classification.

This fact is again demonstrated by the arguments by which the courts below, succeed with apparent difficulty, in upholding the regulation complained of. (See the Ehret Co. case 273 Fed 689 for the argument of Judge Thompson)

But both Judges are obliged to confess that the statute is ambiguous, and they attempt to justify their conclusions by holding that another even more onerous construction of the act may be arrived at. But both the construction upheld, and the severer construction which they say might have been adopted by the Department, require imperatively the addition of words to the statute, which, it must be conceded, is inadmissible in the case of a tax statute. Hobbs vs McLean 117 U. S. 567. Judge Thompson, further, without apparently being aware of the vagaries in practical application of the rule prescribed by the department, says

> "By reducing the amount of tax to be paid at the lower rates it increases the amount to be paid at the higher rates, so that the higher rates apply more heavily in proportion to the percentage of profits in excess of the pre war basis; and that is what Congress evidently intended".

This is an obvious *non sequitur* from Judge Thompson's premises, for we have demonstrated above that the regulations pervert this intent of Congress and, by absorbing the deduction in the lower brackets, tax at the highest rate numberless cases of small increased profits over pre war conditions, never intended to be so taxed and, that the reduction of the tax due under the lower rate operates, first, to tax the deduction, and second, to force into the 60% tax cases never intended to pay more than 20%. Judge Thompson's error is due, perhaps, to failure to test the regulations by concrete examples. The evil effect is scarcely demonstrable or apparent from abstract consideration. Further, in the Ehret case, the profits and

deduction were entirely absorbed in the 20% tax class, and the Court declined to consider what the rule effects when the deduction exceeds 15% of the capital. In consequence, the Ehret opinion is an incomplete disposition of the question. It declines to consider the rule as a whole and in consequence misses or ignores the body of the legal question involved.

The regulations do not succeed in applying the tax fairly to the excess over the sum deemed fairly to represent pre-war profits.

It is said in reply that the law is ambiguous and that a harsher interpretation might allow the deduction only in that part of the profits up to 15% of the invested capital, and if the deduction exceeded that amount, it could not be availed of to diminish the amount subject to the next higher rate of tax.

Such a law would be a novelty in revenue acts. Deductions allowed are invariably applied to determine if there be any residue subject to tax. We make bold to say that there never was a law with such a provision as would avail to exempt from the minimum rate and cast a taxpayer first into a higher rate.

Furthermore, if there be ambiguity in the law, as both District Judges expressly or by necessary implication confess, and as the Department in defendant's brief below was forced to admit, such ambiguity must be resolved in favor of the taxpayer.

U. S. vs Coulby 258 Fed. Rep. 27.
and the same case below,
251 Fed. Rep. 982.

Gould vs Gould, 245 U. S. 151.
and cases cited

Knowlton vs Moore, 178 U. S. 42.

In the last case cited, an attempt was made to apply a higher progressive tax to a legacy, measuring the incidence by the accident of its forming part of a larger estate, and hence having no relation to the reason underlying the law, but this Court reversed the decree based upon such an interpretation and held that where a statute admitted of such inequalities, independent of any relation to the reason of the law, another interpretation must be sought which would harmonize with such reason.

Reference is made to familiar authorities to the effect that the intention to tax in the way claimed by the defendant must appear in clear and unambiguous language and that words of exemption should be liberally c nstrued.

Eidman v Martinez 184 U. S. 578.

A. N. & T. Co., vs Worthington, 141 U. S. 468.

United States v Isham 84 U. S. 496.

It cannot be argued, in the instant case (as it must be to sustain the legality of the result) that the tax *primarily was intended* to be higher when the deduction bore a certain relation the capital. The tax was intended to reach war profits. The amount of the deduction was intended to be a fair estimate of profits prior to and independent of war conditions and it was fully exempted from the tax. Hence the proportional relation of the deduction to capital has no relevancy to the rate of tax to be imposed, nor the reason thereof. It is exempted from tax because it is deemed a reasonable return under pre war conditions. What then

forms the basis for taxing the first dollar above that amount, at one of the higher rates and not at the minimum rate of the war excess profits tax? This first dollar will be taxed under the regulations at 25% or 35%, 40 or 60% instead of 20% simply because of the accidental mathematical relation of the deduction (or reasonable pre war profits) to invested capital and to the perverse reasoning of the Treasury Department.

This result is not only not sanctioned by the law, but is plainly counter to the spirit, intent and purpose of the law, as declared by its title and language, and the circumstances surrounding its enactment.

The Government, in its brief and argument below, referred to the omission of the phrase "in excess of the deduction" in the clauses of the law applying the second and succeeding higher rates, and argued that such rate of 25% and so on, could be applied to the residue of net income over the 15% class, without any deduction whatever and that the regulations actually levy less taxes than might have been exacted under a strict application of the statute. Confession was made in the same breath, however that such interpretation was clearly not within the intention of Congress as shown by the statute taken as a whole, and that the strict interpretation adverted to would be manifestly contrary to this evident intention of Congress. But if the department's interpretation of the law in the clause levying the 20% tax is correct, that is, that the intent is not first to subtract the deduction and apply the tax only to the residue, they can only escape the rigid construction by which the high tax is levied without deduction by the succeeding clauses, by reading into each succeeding clause words which are not there. If these supplied words are "in excess of the deduction", the result must be to read the

statute as we contend it should be read anyhow. And if they attempt to supply other words to harmonize with Articles 18 and 19 of the regulations, so many words will be required as plainly to constitute departmental legislation and hence to be void.

Their brief below took cognizance of the "large standpoint of the statute as a whole", only far enough to avoid falling into the pit dug by their "strict interpretation" of the law.

It comes to this, that if we approach the language of the act through the avenues of the circumstances of the enactment, the public intent and purposes as expressed in the title of the act, and apparent on inspection of the act as a whole, and as expressed in the La Belle case, we shall reach the conclusion for which we contend.

If, mole like, we burrow only within the soulless words of separate clauses, without eyes to see the broad purpose of the act to define, segregate and reach *war excess profits* in proportion and with a heavier incidence as they do exceed pre war profits, we may reach the conclusion contended for by the government, but the result will not be to reach and tax only war excess profits in the manner imported by the name of the act, but to tax all profits in accordance with their accidental mathematical relation to some obscure formula wholly foreign to Congress' intention. The government's argument is an illustration of the adage that "the letter killeth but the spirit maketh whole". In these circumstances the Court will confine the operation of the letter to the intent and meaning of Congress as gathered from the statute as a whole.

Petri vs Conn Bank 142 U. S. 644.

II.

The questions of jurisdiction and duress were correctly disposed of below.

There can be no doubt of the jurisdiction of the court. The plaintiff has a cause of action founded upon "a law of Congress" and "a regulation of an Executive Department" "in respect to which claims the party would be entitled to redress against the United States, either in a Court of law, equity or admiralty, if the United States were suable", within the quoted language of Section 24, sub. 20 of the Judicial Code.

If the facts stated in the complaint lead to the legal conclusion that the amount claimed was in excess of that justified by the law, a common law action for a recovery would lie against the Collector who received the money; and in such case a cause of action would lie against the Collector's principal, if a private person; wherefore, because of the statute, an action does arise against the United States. In this case, the claimant may pursue the Collector (whom the United States will indemnify), or proceed directly against the latter as the ultimate beneficiary and avoid "adding a fifth wheel to the coach" in the language of Mr. Justice Holmes of the Supreme Court in,

> United States vs Emery, Bird, Thayer, Realty Co., 277 U. S. 28, 35 Sup. Ct. 499.

which is a short and complete authority for the jurisdiction of the Court in the premises.

It seems difficult to convince United States Attorneys that such is the law, as the question of jurisdiction was raised, and uniformly decided in favor of the claimant in each of the following cases,

United States vs Hvoslef, 237 U. 31. 35 Sup. Ct. 459.

Dooley vs United States, 182 U. S. 222.

Mill Creek &c., R. Co. vs United States, 246 Fed. Rep. 1013.

United States vs Finch, 201 Fed. Rep. 95.

No other exclusive remedy is provided by the Act of October 3rd, 1917.

On the contrary, that Act brings into operation all administrative, special and general provisions of law including the laws in relation to the assessment, remission, collection and refund of internal revenue taxes not theretofore specifically repealed and not inconsistent with the Act. (Section 212 Act of October 3rd, 1917).

This brings into operation Sections 3220, 3226, 3227 and 3228 of the Revised Statutes which are specifically considered in the last cited case (U. S. vs Finch) and in the Emery case supra, as not inconsisten with nor prohibitive of an action against the United States. The time limit fixed by § 3228 is extended to 5 years by § 252 of the Revenue Act of 1918, but this has no special bearing upon the present case. Section 3226 plainly contemplates suits for the recovery of illegal taxes by providing that before a suit shall lie an appeal must be taken to the Commissioner.

No new remedy is provided by the Revenue Act of

1918 and practically the whole of the act of October 3rd, 1917, was repealed by the former.

So that we have no special or exclusive remedy, and are therefore wholly within the authorities above cited.

See also Roberts vs Lowe, 236 Fed. Rep. 604.

Phila &c., vs Lederer, 239 Fed. Rep. 184, 187. aff'd 242 Fed. Rep. 492.

Henry vs United States, 251 U. S. 558.

Maryland Casualty Co. vs United States, 251 U. S. 342.

The two last cited cases arose in the Court of Claims, but the principle is the same. They proceeded to the Supreme Court without the question of jurisdiction being raised. They are cited as showing the practice, and that the question of jurisdiction is no longer open in the Supreme Court.

The purpose of the government to refund any moneys erroneously collected under the Act of October 3rd, 1917, is clear from § 252 of the Revenue Act of 1918, expressly so providing.

III.

Appeal from and writ of error to the judgment complained of lie directly to this court.

The practice pursued is based upon

J. Homer Fritch Co. vs United States, 248 U. S. 458, 63 L. Ed. 359.

As the issue decided was a plain issue of law, writ of error would seem to be the proper appellate remedy, but as the District Court was sitting as a Court of Claims under the Tucker Act, the procedure prescribed by statute (§ 242 Judicial Code § 1219 U. S. Comp. St. 1916), seems to be by appeal.

Both remedies are therefore resorted to prevent a failure of review because of an improper remedy, altho that danger may be obviated by §1649 a. U. S. Comp. St., Act September 6th, 1916, c 448 § 4.

CONCLUSION.

For the foregoing reasons, it is submitted that the decree of the Court below is erroneous and should be reversed with directions to render judgment for the plaintiff in error and appellant against the United States for the sum of $4420.40 with interest from June 13, 1918, and further that it be adjudged:

That the Treasury regulations No. 45 Articles 16 and 17, as herein complained of, are void in directing the deduction under the excess profits law of October 3rd, 1917, to be applied in the course of the computation of the tax, and that the law means, intends and requires that the deduction be first subtracted from the net profits and that the excess profits tax applies only to the residue then segregated into classes 15% &c.

Respectfully submitted,

PERCY L. HOUSEL,

M. HAMPTON TODD,
of Counsel for plaintiff in error and appellant.

Appendix A.

Regulations No. 41. War Excess Profits Tax under Act of October 3, 1917.

Art. 14. Classification of net income. — For the purposes of the excess profits tax net income which is subject to the tax shall be divided into two classes, as follows,

A. Net income which is derived from a trade or business having no invested capital, or not more than a nominal capital, including in the case of an individual salaries, wages, fees, or other compensations; and

B. Net income which is derived from a trade or business having invested capital.

In the case of a corporation or partnership, all the trades and businesses in which it is engaged will be treated as a single trade or business (as provided in sec. 201), and its entire income will be held to be of the same class as the income from its principal trade or business.

In the case of an individual the net income subject to the excess profits tax shall be classified as provided in this article. Net income of class A shall be taxed as provided in article 15, and net income of class B shall be taxed as provided in article 16.

***Art. 16. Rate of tax on income of class B. —

The tax upon net income of class B as defined in article 14 shall, except as otherwise provided in article 17, be computed at the following rates:

20 per cent. of the amount of the net income in excess of the deduction (determined as provided in articles 21, 23 and 24) and not in excess of 15 per cent of the invested capital for the taxable year;

25 per cent of the amount of the net income in excess of 15 per cent. and not in excess of 20 per cent. of such capital;

35 per cent. of the amount of the net income in excess of 20 per cent. and not in excess of 25 per cent. of such capital;

45 per cent. of the amount of the net income in excess of 25 per cent. and not in excess of 33 per cent. of such capital;

60 per cent. of the amount of the net income in excess of 33 per cent. of such capital.

Illustrations.— (1) A corporation has a capital of $100,000, prewar earnings of 7 per cent., and a net income for the taxable year of $75,000.

The deduction allowed will be 7 per cent. of the capital or $7,000. plus $3,000. specific deduction, a total of $10,000.

The amount of the net income taxable at each rate will be as follows:

In excess of the deduction and not in excess of 15 per cent. of the capital (rate, 20 per cent) - - - - -	$5,000.
In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof (rate, 25 per cent) - - - -	5,000.

In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof (rate, 35 per cent) - - - - 5,000.

In excess of 25 per cent. of the capital and not in excess of 33 per cent. thereof (rate, 45 per cent.) - - - - - 8,000.

In excess of 33 per cent. of the capital (rate 60 per cent.) - - - - 42,000.

The tax would then be computed as follows:

20 per cent. of $ 5,000. - - -	$ 1,000.
25 per cent. of $ 5,000. - - - -	1,250.
35 per cent. of $ 5,000 - - -	1,750.
45 per cent. of $ 8,000. - - -	3,600.
60 per cent. of $42,000. - -	25,200.
Total Tax - - -	$32,800.

(2) An individual or partnership has a capital of $100,000, prewar earnings of 8 per cent., and a net income for the taxable year of $22,500.

The deduction allowed will be 8 per cent of the capital, or $8,000. plus $6,000 specific deduction, a total of $14,000.

The amount of the net income taxable at each rate will be as follows:

In excess of the deduction and not in excess of 15 per cent. of the capital (rate, 20 per cent.) - - - - $1,000.

In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof (rate 25 per cent.) - - - - 5,000.

In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof (rate 35 per cent.) - - - - 2,500.

The tax would then be computed as follows:

20 per cent. of $1,000. - -	$ 200.
25 per cent. of $5,000. - - -	1,250.
35 per cent. of $2,500. - - -	875.
Total tax, - - - -	$2,325.

Art. 17. When deduction exceeds 15 per cent. of invested capital. — In any case in which the deduction determined as provided in articles 21, 23 and 24 is greater than 15 per cent. of the invested capital and therefore can not be fully allowed under the first rate or bracket of article 16, then any remaining portion of the deduction will be allowed under the second bracket, and continued if necessary into the succeeding bracket or brackets until the entire amount of the deduction is allowed.

Illustrations. (1). A corporation has a capital of $),000; prewar earnings of 9 per cent; and a net income for the taxable year of $10,000.

The deduction allowed will be 9 per cent. of the capital or $810. plus $3,000. specific deduction, a total of $3 810.

The amount of the net income in each bracket will be as follows:

15 per cent. of the capital, - -	$1,350.
In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof, -	450.
In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof, - -	450.
In excess of 25 per cent. of the capital and not in excess of 33 per cent. thereof, - -	720.
In excess of 33 per cent. of the capital	7,030.

It is evident that the total deduction of $3,810 is

greater than 15 per cent. of the capital and so is not fully absorbed by the amount of net income not in excess of 15 per cent. of the capital. In such case, applying article 17, the total deduction of $3,810 will be distributed as follows:

$1,350 in the first bracket, leaving nothing to be taxed at the 20 per cent. rate.

$450. in the second bracket, leaving nothing to be taxed at the 25 per cent. rate.

$450. in the third bracket, leaving nothing to be taxed at the 35 per cent. rate.

$720. in the fourth bracket, leaving nothing to be taxed at the 45 per cent. rate.

There still remains $840. of the deduction to be allowed in the fifth bracket against the $7,030 of income which would otherwise be taxable under that bracket. There would then be $6,190. of net income left to be taxed at the 60 per cent. rate under the fifth bracket. Hence, the total excess-profits tax in this case would be $3,714.

(2) An individual or partnership has a capital of $40,000. prewar earnings of 9 per cent. and a net income for the taxable year of $12,000.

The deduction allowed will be 9 per cent. of the capital, or $3,600. plus $6,000. specific deduction, a total of $9,600.

The amount of the net income in each bracket will be as follows:

15 per cent of the capital, - -	$6,000.
In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof, - -	2,000.
In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof, - -	2,000.

In excess of 25 per cent. of the capital and not in excess of 33 per cent. thereof. - - 2,000.

It is evident that the total deduction of $9,600. is greater than 15 per cent. of the capital and so is not fully absorbed by the amount of net income not in excess of 15 per cent. of the capital. In such case, applying article 17, the total deduction of $9,600. will be distributed as follows:

$6,000. in the first bracket, leaving nothing to be taxed at the 20 per cent. rate.

$2,000. in the second bracket, leaving nothing to be taxed at the 25 per cent. rate.

$1,600. the balance of the deduction, to be allowed against the $2,000 of income in the third bracket.

There would then be $400. of income left in the third bracket to be taxed at the 35 per cent. rate, and $2,000 in the fourth bracket to be taxed at the 45 per cent. rate. Hence, the total excess-profits tax in this case would be $1,040.

Supreme Court of the United States

No. [redacted] October Term, 1916

[redacted]

Plaintiff in Error and Appellant,

v.

THE UNITED STATES

In Error to and Appeal from the District Court of the United States for the Eastern District of New York.

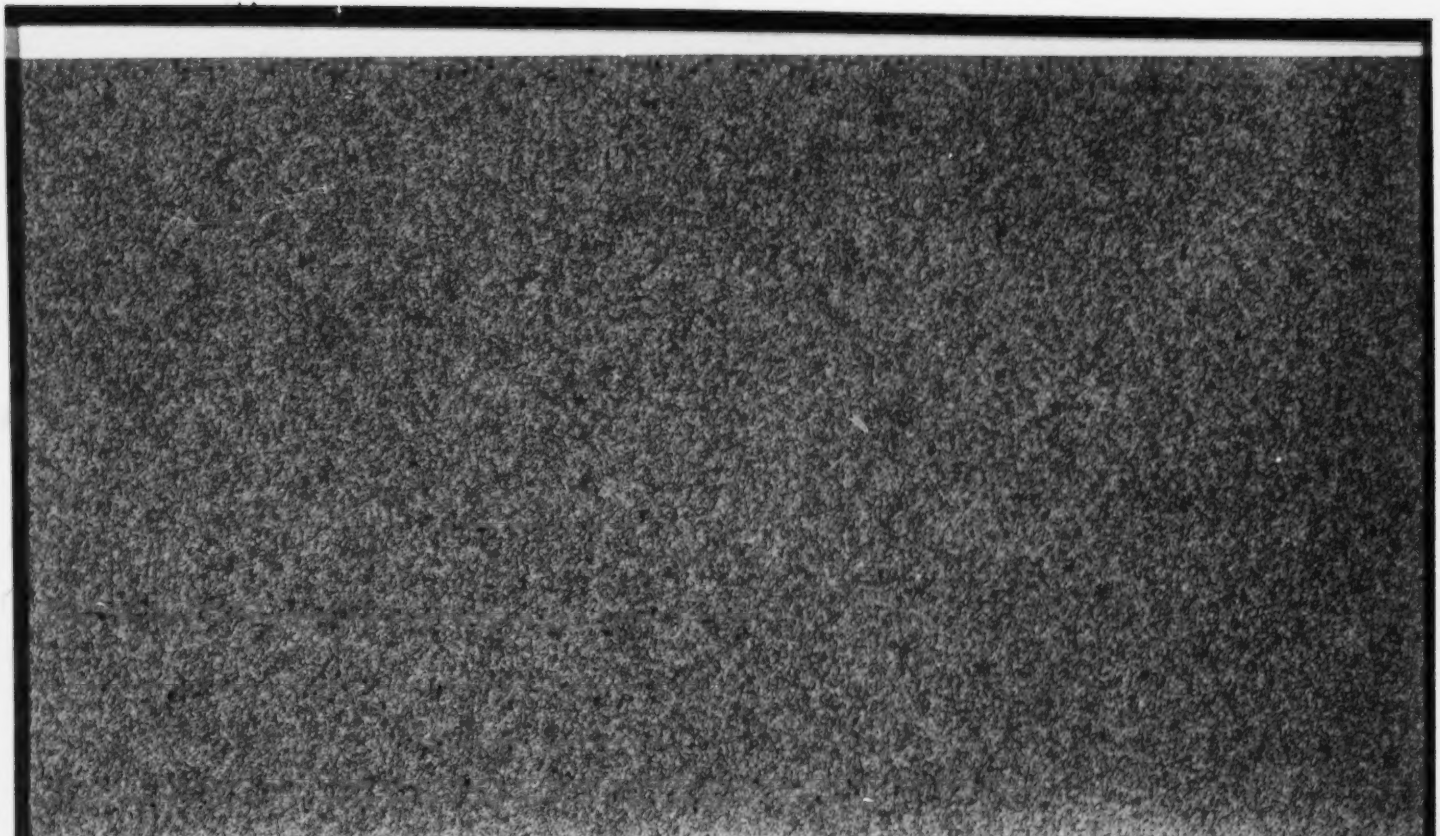
Additional Brief of Plaintiff in Error and Appellant

R. HAMPTON TODD,

Of Counsel with

Plaintiff in Error and Appellant.

[redacted]



IN THE

Supreme Court of the United States

October Term, 1921. No. 231.

GREENPORT BASIN AND CONSTRUCTION COMPANY,
Plaintiff-in-Error and Appellant,
v.
THE UNITED STATES.

Brief on Behalf of the Plaintiff-in-Error and Appellant.

In assessing the Excess Profits Tax in this case the Revenue Department deducted the plaintiff's exemption from taxation from 15 per cent. of the invested capital. We contend that such exemption should be subtracted from the whole of the net income and the graduated tax assessed on the residue. Whether the Revenue Department's method of computing the tax or our method is the legal one, depends upon the construction to be given to the language of the Revenue Act of October 3, 1917, imposing taxes on "War Excess Profits."

The scope and the purpose of this act cannot be better stated than it is by Mr. Justice Pitney in *La Belle Iron Works v. United States,* Advance Opinions, June 15, 1921, at page 604, where he says:

> "Title II provided for the levying of 'War Excess Profits Taxes' upon corporations, partnerships and individuals. As applied to domestic

> corporations, the scheme of this title was that, after providing for a deduction from income (Sec. 203, p. 304) equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the pre-war period (the years 1911, 1912 and 1913) was of the invested capital for that period, but not less than 7 nor more than 9 per cent., plus $3000 it imposed (Sec. 201, p. 303), in addition to other taxes, a graduated tax upon the net income *beyond the deduction,* commencing with 20 per centum of such net income *above the deduction,* but not above 15 per centum of the invested capital for the taxable year, and running as high as 60 per centum of the net income in excess of 33 per centum of such capital. It applied to 'all trades or businesses' with exceptions not now material (p. 303)."
>
> The italics are for emphasis.

It is the "net income *beyond* the deduction *commencing* with 20 per centum of such net income *above* the deduction" which is taxed in the first class which is ascertained as not being "above 15 per centum of the invested capital for the taxable year."

Language cannot be made more plain than this. It is the "net income beyond the deduction" that is taxed. In other words, the net income is not to be taxed until the deduction has first been taken from it. This is the whole of our contention.

Mr. Justice Pitney gives the reasons for thus construing the language of the statute. He says at page 606:

> "The Revenue Act of October 3, 1917, passed after we had become engaged in the war, took the place of the Act of March 3, and embodied a 'war excess profits tax,' with higher percentages imposed upon the income in excess of deductions, and a more particular definition of terms. A scrutiny of the particular provisions of Section 207 shows that it was the dominant purpose of

> Congress to place the peculiar burden of this tax upon the income of trades and businesses *exceeding what was deemed a normally reasonable return upon the capital actually embarked.*"
>
> We printed in italics for emphasis.

The act imposed a graduated tax on what were popularly known as "Excess Profits." Such "Excess Profits" consisting of all profits earned in excess of the assumed normal profits earned in the three years, 1911, 1912 and 1913, designated in the act as the "pre-war period," but not less than 7 nor more than 9 per centum. After deducting the allowable pre-war profits together with a specific deduction of $3000 from the net income, the balance of the net income is to be taxed as "Excess Profits" in accordance with the graduated scale, that is so much of such "Excess Profits" as should be represented by a sum equal to 15 per centum of the invested capital is to be taxed at the 20 per centum rate. The sum equal to the next 5 per centum of invested capital is to be taxed 25 per centum. The sum equal to the next 5 per centum of invested capital is to be taxed 35 per centum. The sum equal to the next 8 per centum of the invested capital is to be taxed 45 per centum, and the balance or remainder of the "Excess Profits" is to be taxed 60 per centum.

This is what we understand Mr. Justice Pitney to mean when he says, *supra:*

> "Commencing with 20 per centum of such net income above the deduction, but not above 15 per centum of the invested capital for the taxable year, and running as high as 60 per centum of the net income in excess of 33 per centum of such capital."

The mention of what is to be taxed at the 60 per centum rate necessarily excludes everything else. The revenue officials say this is not correct. They contend that the deduction must be taken off of the earlier

classifications of invested capital which is taxed at the lower rates, thereby throwing it into the later classifications of invested capital, which is taxed at the higher rates. We contend, as hereinbefore stated, that the deduction is to be taken off the net income before classification of the net income designated by the act as "Excess Profits" begins.

Irrespective of what was said by Mr. Justice Pitney in *La Belle Iron Works v. United States, supra,* we submit that both on principle and authority the Court below in adopting the Revenue Department's construction of the act and thereupon entering judgment for the defendant, was in error.

The defendant's construction of the act can be more clearly seen than it can be stated, by reference to the illustrations for computing the tax as set forth in the regulations of the Internal Revenue Department No. 41, Art. 17. There are two illustrations given, one for a corporation, the other for a partnership, but the method governing the computing of the tax is the same in both instances. We quote the illustration in reference to a corporation, which is as follows:

> "(1) A corporation has a capital of $9000; prewar earnings of 9 per cent.; and a net income for the taxable year of $10,000.
>
> The deduction allowed will be 9 per cent. of the capital, or $810, plus $3000 specific deduction, a total of $3810.
>
> The amount of the net income in each bracket will be as follows:

15 per cent. of the capital	$1,350
In excess of 15 per cent. of the capital and not in excess of 20 per cent. thereof	450
In excess of 20 per cent. of the capital and not in excess of 25 per cent. thereof	450
In excess of 25 per cent. of the capital and not in excess of 33 per cent. thereof	720
In excess of 33 per cent. of the capital	7,030

It is evident that the total deduction of $3810 is greater than 15 per cent. of the capital and so is not fully absorbed by the amount of net income not in excess of 15 per cent. of the capital. In such case, applying Article 17, the total deduction of $3810 will be distributed as follows:

$1350 in the first bracket, leaving nothing to be taxed at the 20 per cent. rate.

$450 in the second bracket, leaving nothing to be taxed at the 25 per cent. rate.

$450 in the third bracket, leaving nothing to be taxed at the 35 per cent. rate.

$720 in the fourth bracket, leaving nothing to be taxed at the 45 per cent. rate.

There still remains $840 of the deduction to be allowed in the fifth bracket against the $7030 of income which would otherwise be taxable under that bracket. There would then be $6190 of net income left to be taxed at the 60 per cent. rate under the fifth bracket. Hence, the total excess-profits tax in this case would be $3714."

It will be observed in the example given that no portion of the net income is taxed at either the 20, 25, 35 or 45 per cent. rate, but all of the net income in excess of the deduction is taxed at the 60 per cent. or highest rate.

In the example set out in the regulations as above we submit that the tax should be calculated as follows:

Invested capital	$9,000.00
Net income for taxable year	10,000.00
Deductable percentage on invested capital 9%	$810.00
Specific deduction	3,000.00
	$3,810.00
Net income for taxable year as above	$10,000.00
Deductions allowed by Act which is the same in both methods.	3,810.00
Net income subject to tax	$6,190.00

15% on invested capital of $9,000.	1,350.	@	20%.....	$270.00
5% " " " " "	450.	@	25%.....	112.50
5% " " " " "	450.	@	35%.....	157.50
8% " " " " "	720.	@	45%.....	324.00
33% In excess of 33% on invested capital,	3,220.	@	60%.....	1,932.00
Net income subject to tax,	6,190.	Total tax		$2,796.00

Tax as calculated by the defendant $3,714.00
Tax as calculated by plaintiff 2,796.00

Excess of tax as calculated by the defendant, $918.00

This difference of $918 is made up by the difference between the 60 per cent. tax rate and the four lower rates as follows:

$1,350.	60%	rate	— 20%	rate	leaves	40%.....	$540.00
450.	"	"	— 25%	"	"	35%.....	157.50
450.	"	"	— 35%	"	"	25%.....	112.50
720.	"	"	— 45%	"	"	15%.....	108.00
							$918.00

In every other exemption from taxation granted in the Act of Congress it is first deducted before the tax is calculated.

Section 7, sub-paragraph (a) Act of September 8, 1916, Statutes at Large, page 756, under the title of personal exemption, says, page 761:

> "That for the purpose of the normal tax only there shall be allowed *as an exemption in the nature of a deduction* from the amount of the net income of each of said persons, ascertained as provided herein, the sum of $3000, plus $1000 additional if the person making the return be a head of a family."

Tax on corporate income is direct on the net income. There are no specific exemptions under this act.

Estate tax, page 777, Section 201:

> "That a tax (hereinafter in this title referred to as the tax) equal to the following percentages

of the value of the net estate, to be determined as provided in section 203, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether resident or non-resident of the United States;

One per centum of the amount of such net estate not in excess of $50,000;"

and thereafter a graduated tax, the last item being, as follows:

"Ten per centum of the amount by which such net estate exceeds $5,000,000."

Page 778, section 203:

"That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate."

(1) Funeral expenses, administration expenses, etc., and

"(2) An exemption of $50,000."

In the same act, section 407, page 789, imposing an excise tax on capital, the exemption is stated in the following language; page 790:

"Provided that for the purpose of this tax an exemption from the amount of capital so invested shall be allowed equal to such proportion of $99,000 as the amount so invested bears to the total amount invested in the transaction of business in the United States or elsewhere."

The Act of October 3, 1917, Statutes at Large, 1917, page 300, under the title War Income Tax, Section 2, page 301, enacts:

". . . there shall be levied . . . a like additional tax upon the income of every individual received in the calendar year nineteen hundred

and seventeen and every calendar year thereafter, as follows:

One per centum per annum upon the amount by which the total net income exceeds $5000 and does not exceed $7500;"

thereafter a graduated tax until, as follows:

"Fifty per centum per annum upon the amount by which the total net income exceeds $1,000,000."

"Sec. 3. That the taxes imposed by sections one and two of this Act shall be computed . . . upon the same basis and in the same manner as the similar taxes imposed by Section one of such Act of September eighth, nineteen hundred sixteen, except that in the case of the tax imposed by section one of this Act (a) the exemptions of $3000 and $4000 provided in section seven of such Act of September eighth, nineteen hundred and sixteen, as amended by this Act, shall be, respectively $1000 and $2000."

What good reason can be given for first deducting the exemption before assessing the tax in the "Estate Tax," in the "Excise Tax" and in the "War Income Tax" and not follow the same course in the "Excess Profits Tax"? Congress expressly provided that a business concern, corporation or partnership should be entitled to earn an untaxed profit equal to a sum not less than 7 or more than 9 per cent. of its invested capital. It was the earnings or profits beyond this exemption that were deemed *excess profits* and taxed as such. It was within the discretion of Congress to impose a tax on the net income without allowing any exemption, but when it does grant an exemption from taxation of a certain percentage of profits, how can it be seriously contended that in the same enactment it imposed a tax on this very exemption.

Before further discussing the language in the Act of Congress imposing the tax, we desire to submit some of the many cases stating the rules which govern in construing tax statutes:

> "A statute conferring authority to impose taxes must be construed strictly, a strict construction being fully authorized by the nature and consequences of the proceeding."

Desty on Taxation, 1st Volume, page 102, Edition 1884, citing:

> Barnes v. Doe, 4 Indiana 133;
> Williams v. State, 6 Blackford 36.

> "Every charge under the act must be imposed by clear and unambiguous words."

Desty on Taxation, 1st Volume, page 257 (Note 5), citing:

> Smith v. Waters, 25 Indiana 397;
> Williamsburg v. Lord, 51 Maine 599;
> Boyd v. Hood, 57 Pa. 98;
> Savannah v. Hartridge, 8 Ga. 23;
> United States v. Distilled Spirits, 10 Blatchf. 428.

> "Nor can a provision omitted purposely or by error be supplied."

White Income Tax Act, page 25, citing:

> Hobbs v. McLean, 117 U. S. 567.

> "If there be ambiguity in any particular, such construction should be adopted as to harmonize the act with the general legislative purpose and spirit."

White Income Tax Act, page 25, citing:

> Cardinal v. Smith, 197 Federal Cases 2395;
> Warren v. United States, 58 Fed. 559;

Bernier v. Bernier, 147 U. S. 242;
Petri v. Commercial Bank, 142 U. S. 644;
Duronsseau v. United States, 6 Cranch. 307.

"Congress is bound to express its intention to tax in clear and unambiguous language. . . . *Words of exemption should be liberally construed.*"

White on Income Tax, page 27, citing:

N. Y. Tel. Co. v. Treat, 130 Fed. 340;
Eidman v. Martinez, 184 U. S. 578.

"Before property can be taken under the taxing power it is necessary that the statute be clear and unambiguous."

White on Income Tax, page 27, citing:

Pa. Life Ins. Co. v. McClain, 105 Fed. 367;
Phila. &c. Rd. Co. v. Kinney, Federal Cases 1188.

"Where a tax is of doubtful construction, the doubt is to be construed in favor of the taxpayer under both the English and American rules."

White on Income Tax, 28, citing:

A. N. & T. Co. v. Worthington, 141 U. S. 468;
United States v. Isham, 84 U. S. 496;
Wright v. Michigan &c. Rd. Co., 130 Fed. 843;
McNulty v. Field, 119 Federal 445;
United States v. Mullins, 119 Federal 334.

"It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."

Potters Dwarris, 255.

In Dock Company v. Browne 2d B. & Ad., 58 Lord Tenterden said:

> "These rates are a tax upon the subject and it is a general rule that a tax shall not be considered to be imposed without a plain declaration of the intent of the legislature to impose it."

Potters Dwarris, 256.

> "A power derogatory to private property must be construed strictly and *not enlarged by intendment.*"

Potters Dwarris, 257.

Note 40, same page, says:

> "Every statute derogatory of the rights of property or that takes away the rights of a citizen, is to be strictly construed."

Van Horn v. Dorrance, 2 Dall. 316.

In Boyd v. Hood, 57 Pa. 98, Agnew, J., said, page 101:

> "A tax law (and a stamp tax for the purpose of revenue is such) cannot be extended by construction to things not named or described as the subject of taxation."

Cited by Kunkel, P. J., in Commonwealth v. Harrisburg L. & P. Co., 262 Pa. 238, 241, where he says:

> "The terms of the statute must be clear and unambiguous if the Commonwealth is to be entitled to the tax imposed."

Pollock, C. B., in Girr v. Scudds, 11 Exchequer 191, said:

> "A tax cannot be imposed without clear and express words for that purpose."

Cited by Mr. Justice Hunt in United States v. Isham, 84 U. S., at page 504.

In Bernier v. Bernier, 147 U. S. 242, Mr. Justice Field says, page 246:

> "When a provision admits of more than one construction that one will be adopted which best serves to carry out the purposes of the act."

Revenue laws "are not to be extended beyond the clear import of the language used; in order to sustain the tax it must come clearly within the letter of the statute."

36 *Cyc.* 1189 and notes.

The language of the statute imposing the tax in this instance, section 201, is:

> "Sec. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:
>
> Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;
>
> Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital."

The 35 per cent., 45 per cent. and 60 per cent. graduated tax is expressed in the same language as the 25 per cent. tax is stated.

The deduction is provided for in section 203, and is in the following language:

> "That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided:

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3000;"

The language imposing the tax may be divided into the following sentences:

1. Twenty per cent. of the amount of the *net income*.
2. In excess of the deduction.
3. Determined as hereinafter provided.
4. And not in excess of fifteen per centum of the invested capital for the taxable year.

This language must be read in connection with the subsequent classifications and when so read it means that a graduated tax from 20 per cent. to 60 per cent. is imposed on the amount of the *net income* in excess of the deduction as fixed by the statute in accordance with the several classes to which the graduated tax is to apply. It is the amount of the "net income in excess of the deduction" that is taxed. It is not the amount of the net income which shall equal the amount "not in excess of fifteen per centum of the invested capital" from which the deduction is to be made and the balance thereof taxed as contended for by the defendant. There is no such language in the statute, nor yet any paraphrase thereof that would justify such a construction. In short, the tax is imposed upon all the net income less the deduction provided for by the statute.

As we understand it, the defendant's construction of this language is that having ascertained the amount

of the net income in the manner pointed out in the statute you then ascertain what sum will be equal to 15 per cent. of the invested capital; if that sum is more than the exemption or deduction it is to be deducted from the exemption and as a consequence no part of the net income is to be taxed at the 20 per cent. rate. The next four classes are to be ascertained in the same way with the result that if the exemption amounts to as much or more than 33 per cent. of the invested capital then all the net profits in excess of the exemption are taxed at the 60 per cent. rate and no part of them at the lower rates of taxation.

The defendant's contention is founded on the theory that the exemption must be applied simultaneously with the classification on the basis of increased percentages of invested capital. The heretofore cited cases show that it is a fundamental rule of construction of tax legislation which is a *pro tanto* confiscation of the taxpayer's property, that it shall be strictly construed against the Government. If the language used will admit of two constructions, that one will be adopted which is most beneficial to the taxpayer. It is also a rule of construction of such legislation that the language shall be construed so as to produce equality of burden. Under both these rules, the construction contended for by the defendant is wrong. In the first place, what are the words in the Act of Congress on which the defendant bases the contention that the exemption must be applied simultaneously with the ascertainment of the several classes for taxation at the progressive rates? There is no express language in the act providing *for taking the statutory deduction from the percentages of invested capital.* If this requirement is to be found in the act, it must be *by intendment.* On this point we understand the defendant's position to be that because the statute in imposing the 20 per cent. tax on the class

represented by an amount of income not in excess of fifteen per centum of the invested capital said that the tax on the first class should be 20 per cent. of the amount of the net income in excess of the deduction, it necessarily meant that having ascertained the 15 per cent. on the invested capital class you must apply the exemption or so much thereof as is necessary to absorb the amount taxable in that class. It seems to us that this does not necessarily follow. We submit that if you deduct the exemption from the net income first and then ascertain the respective classes of invested capital you comply with the fair meaning of the words used in the statute.

The words used in the statute are "the amount of the *net income* in excess of the deduction" plainly mean that the "net income" to be subject to the graduated class tax is what remains thereof after the deduction has been made. This construction is strengthened by the language used in defining the rate of tax and the ascertainment of the second class subject to taxation. The words are:

> "Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital."

It is to be observed that in defining this class and its rate of taxation the words "in excess of the deduction (determined as hereinafter provided)" *are omitted.*

The defendant's contention requires that they should have been repeated or else referred to by some appropriate words such as "the residue of the deduction or so much thereof as necessary shall be deducted."

In the blanks furnished by the Internal Revenue Department for reporting excess profits income and

in the examples given in the regulations for reckoning the tax, do require the deduction to be made not only in this class, but likewise in all subsequent classes. There are no words in the act that requires the income in the subsequent classes to be excluded from taxation by absorbing the amount thereof, in the exemption or deductions allowed by the act. In very truth, the words used fairly and reasonably mean that so much of the income as is in excess of fifteen per centum and not in excess of twenty per centum of such capital (*i. e.*, invested capital for the taxable year) shall be taxed at the rate of twenty-five per cent. As heretofore stated, there is no provision of any kind for any deduction under any circumstances, yet the defendant's contention requires a deduction to be made. Let us suppose the act had not provided for any exemption, specific or otherwise, would any one contend that the language used meant anything else than what we contend it does mean? Yet the defendant contends that the exemption from taxation granted by the act must be brought into the second and following classes and if more than sufficient to the extent thereof absorbed and the surplus exemption passed to the next class. What authority is there in the language of the act for such a construction?

In view of the omission of the words "in excess of the deduction" from the definition of all the remaining classes, is it not a reasonable construction of the act to hold that the deduction provided for in the act had been finally disposed of in defining the class subject to the 20 per cent. tax? If this is so, then the defendant's construction that the exemption is to be used and applied in each succeeding class until it is absorbed is unsound. The only remaining construction is that the exemption must be first deducted from the net income before ascertaining the respective

classes subject to the graduated taxes. If this construction is right, then every word in the act is given full force and effect.

The defendant's contention can be stated in another way, that is, that the language of the act requires that the exemption shall be deducted from the amount of the net income which is not in excess of 15 per cent. of the invested capital. (In point of fact that is exactly what the defendant did in the pending case.) The first answer to this is that it is not true. The language says nothing of the kind. The act says it is to be deducted from the amount of the net income. The whole of the net income, not from a part of it. To have authorized the defendant's construction, the act should have been expressed in language substantially like this:

Twenty per cent. of the amount of the net income which shall not exceed 15 per cent. of the invested capital, less the deduction determined as hereinafter provided. Any surplus of such deduction shall be absorbed in the subsequent classes.

If the rules of grammar and logic are to have any weight then what authority is there for deducting the exemption from the percentage of invested capital provided for in the last clause in the paragraph when the act says in the second clause that the deduction is to be made from its antecedent clause which is "the amount of the net income."

INEQUALITY OF BURDEN.

The defendant's construction of the statute violates the canon of construction that requires all taxing statutes to be construed so as to produce uniformity and equality of burden upon all property which is within the same class.

The previous legislation provided only for direct income taxes and so far as corporations were concerned, there was no specific or other exemption from taxation provided for in the statutes in force. The title under which the tax in question was levied shows it was the intention of Congress to reach what were popularly known as "war excess profits." It was recognized that necessarily some corporations or partnerships would make greater profits than others, that it was reasonable that they should have a certain amount of profits which should be a fair return on the invested capital and a specific exemption to cover contingencies which should be exempt from taxation and that the profits in excess of the amount should be classified and subject to a progressive graduated tax. This tax was imposed on *profits* and not on *individuals*. Every dollar of excess profits acquired that fell within the class as ascertained by the percentage of invested capital named in the act was *to bear the same tax*. In no other way could uniformity of the tax, or the equality of the burden be maintained. In the example taken from the regulations as to how the tax was to be computed, *supra*, not one dollar of tax is paid under the first four classes at the respective rates of 20, 25, 35 and 45 per cent., but the whole of the net profits are taxed at the rate of 60 per cent. Why should such a corporation or partnership have to pay taxes only under the highest rate and have none of their classified profits taxed under the lower rates while other taxpayers pay under the lower classified rates? Why should one taxpayer's dollar of profits which fall within the same class be taxed more or less than another taxpayer's dollar of profits that are in the same class. It is no answer to this to say that they are not within the same class. The use of the word "class" in this connection is a confusing misuse of the word. Congress made no classfication between those who

made war excess profits; what Congress did was to make a classification based on percentages of invested capital, which is a very different thing. The person, corporation or partnership may not be in the same category by reason of the greater or lesser amount of war excess profits made, but the dollar of excess profits of one is just the same dollar of excess profits of the other and it is such dollar in each class that is taxed. It should be taxed equally, but under the defendant's construction of the act it is not. The defendant by its construction of the statute deprives some corporations and partnerships of having any of its excess profit dollars taxed at the lower rates, which is not only unjust, but is without warrant either in the words of the act or in the scope of its purpose.

In Pollock v. Farmer's Loan and Trust Company, 157 U. S. 429, Mr. Justice Field said, at page 599:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government levied upon the principle of equal and uniform apportionment among the persons taxed and any other exaction does not come within the legal definition of a tax."

In Barbier v. Connolly, 113 U. S. 27, Mr. Justice Field said, at page 31:

> "The Fourteenth Amendment in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

This language of Judge Field was cited by Mr. Justice Harlan in Connolly v. Union Sewer Pipe Company, 184 U. S. 540, at page 559. Justice Harlan further said, at page 560:

> "The difficulty is not met by saying that, generally speaking, the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations, in order to subserve public objects. For this Court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily and without any such basis. . . . *But arbitrary selection can never be justified by calling it classification.* The equal protection demanded by the Fourteenth Amendment forbids this. . . . No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.' "

In re Transfer Tax upon the Estate of Walden Pell, 1st, deceased, 57 L. R. A. 540 (171, N. Y. 48), the third and fourth headnotes are:

> "3. A tax on all remainders or reversions which vested prior to a certain date, but which shall not come into possession until after the passage of the act even if it can be regarded as a tax on property, and not on transfers, is invalid as not bearing equally upon the entire class to which the property belongs."

> "4. A tax on remainders when they come into possession, of 5 per cent. on some, 1 per cent. on others, and on others nothing, even if it can be regarded as a tax on property, and not on transfers, is void for not apportioning the burden equally among the owners of the estates sought to be taxed."

If you will change the words "owners of the estates sought to be taxed" to the words "owners of the net income to be taxed," it will show how closely analogous the cited case is to the one under consideration. The graduated tax in the pending case is ascertained by percentages of invested capital and there is no objection to paying the tax thus ascertained. What we object to is the arbitrary and unequal distribution of the burden brought about by the construction placed upon the act by the Department of Internal Revenue under its Regulations No. 41. The illustration of how the tax is to be computed accompanying these regulations is the best exposition that can be made of the arbitrariness and unequal distribution of the burden of the tax. Take those described in Article 17—one is a corporation, the other is a partnership, The only difference is that a corporation is allowed a specific exemption of $3000 and a partnership is allowed a specific exemption of $6000. Otherwise the methods of computing the tax are identical. In the illustration given of a corporation the whole amount of the taxable net income is taxed at 60 per cent. and no part at any of the lower rates. Now contrast this with the following suggested illustration.

A corporation with a capital of $1,500,000 prewar earnings of 9 per cent. and net income for the taxable year of $500,000 under Regulations 41, the tax would be computed as follows:

				Exemption		*Balance*			
15%	Capital	$225,000.	less	$138,000.		$87,000.	at 20%	tax	$17,400.
5%	"	75,000.	no	exemption	bal.	75,000.	" 25%	"	18,750.
5%	"	75,000.	"	"	"	75,000.	" 35%	"	26,250.
8%	"	120,000.	"	"	"	120,000.	" 45%	"	54,000.
	Balance,	5,000.	"	"	"	5,000.	" 60%	"	3,000.

A partnership under the same circumstances would work out the same way after making the changes due to the higher specific exemption of $6000.

Thus you have one taxpayer with a taxable income of $6190 in the illustration given in Regulation No. 41, paying the 60 per cent. rate on all of his taxable income and another taxpayer with a taxable income of $500,000, paying the 20, 25, 35 and 45 per cent. rates on $495,000 of income and paying the 60 per cent. rate on but $5000 of income. Such illustrations could be multiplied indefinitely, but one is as good as a thousand for the purpose of our argument. In this connection we must not lose sight of the very important fact that the Act of Congress does not provide for a personal classification of income earners; even if it did it would be an arbitrary and illegal classification under the foregoing authorities. A construction of a statute that produces such anomalous results is certainly not to be favored, particularly is this so, if the language of the act will admit of a more reasonable construction and one too, in which the burden of the tax is distributed over every dollar of the amount of the net income subject to the tax without regard to the amount of the taxpayer's income. If you will deduct the exemption from the amount of the net income and tax the balance in accordance with the classification fixed in the Act of Congress, then every dollar of taxable income allocated to the respective classes, as fixed by the percentages of invested capital, will pay the same rate of taxation. No one person would be called upon to pay the 60 per cent. rate on all taxable income and another taxpayer pay the 60 per cent. rate on only one one-hundredth of the taxable income and the remaining ninety-nine one-hundredths at the lower rates of the tax, yet this is exactly what Regulations 41 requires to be done, as the foregoing illustrations show.

It may be stated as a general rule in tax legislation that classification is a legislative function with which the judiciary may not interfere beyond requiring the tax to be uniform and equal upon the whole

class upon which it operates. For the cases on this subject, see the notes to Bacon v. Board of State Tax Commissioners, 60 L. R. A. 321.

In Knowlton v. Moore, 178 U. S. 41, the third headnote is:

> "When a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is not to be favored if another and more reasonable interpretation is present in the statute."

Chief Justice White delivered the opinion of the Court. At page 77, he says:

> "We are therefore bound to give heed to the rule that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. . . . It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

In this case the Supreme Court were passing upon the validity of a succession tax under the provisions of the Act of Congress of June 13, 1898, Chapter 448, which enacted that:

> "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value passing after the passage of this act from any person possessed of such property . . . shall be and hereby are

made subject to a duty or tax to be paid to the United States as follows, that is to say: where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be——"

The act then defines five classes of *persons* who shall pay a graduated tax, namely:

First class 75 cents on each $100 of value.

Second class $1.50 on each $100 of value.

Third class $3 on each $100 of value.

Fourth class $4 on each $100 of value.

Fifth class $5 on each $100 of value.

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars and not exceed the sum or value of one hundred thousand dollars,"

the above classified rates shall be multiplied by one and one-half; between $100,000 and $500,000, the rates shall be multiplied by two; between $500,000 and $1,000,000 the rates shall be multiplied by two and one-half, and in excess of $1,000,000 the rates shall be multiplied by three.

The Collector in this case construed the language of the act which says:

"Where the whole amount of such personal property shall exceed in value ten thousand dollars," etc.,

as authorizing a tax on each legacy at the rate fixed by the total value of the estate. The total value of the estate in question was above $1,000,000 and the tax was assessed at two and one-half times the amount fixed for the respective personal classes.

Mr. Justice White says, at page 65:

"Thus collocated the statute clearly imposes

> the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property."

The construction of the act contended for by the Collector of Internal Revenue in the above case produced inequality in this, that if a legacy of $10,000 was given to a person in the first class out of an estate of less than $25,000 he would pay a tax of seventy-five cents per $100, or $75, but if it were given to him out of an estate of over $1,000,000 his taxes would be multiplied two and one-half times seventy-five cents, that is 1.875, thereby making his tax $187.50. This result Mr. Justice White characterized at page 77, as an inequality and injustice and intimates that if it were necessary the Court might hold on that account that it was beyond the power of Congress to enact such legislation.

In the pending case we have a similar inequality and injustice produced by the construction given to the Act of Congress by the defendant. The defendant contends that if the deduction allowed by the act is absorbed in the first four classifications then the amount of the net income in excess of such deduction is to be taxed at the rate of 60 per cent. and no part of it is to be taxed at any of the lower rates, which we submit is a gross inequality and injustice. To reach this result the defendant makes a personal classification not provided for in the act. The act makes no personal classification. As heretofore pointed out, it makes a property classification, that is, so much of the net profits as does not exceed fifteen per cent. of the invested capital determines the first class, so much of the net profits as is in excess of fifteen per cent. and not in excess of twenty per cent. of the invested cap-

ital determines the second class and thus through all of the classifications. It is the dollar of profits that is taxed according to the classification in which it falls. The defendant's construction ignores this entirely, with the result that the net amount of income of one taxpayer which comes within the first class is taxed 20 per cent., while the net amount of income of another taxpayer which falls in the same class is taxed nothing in that class, but the amount of the net income is passed on—it may be into the last class, where it is taxed 60 per cent. It is no answer to this to say that the person who pays 20 per cent. is in one class, while the person who pays 60 per cent. is in another class, because the Act of Congress makes no provision for such personal classifications. The defendant contends that if one taxpayer earns a net income so large that his exemption is absorbed in the first four classifications then he must be taxed only at the 60 per cent. tax, while another taxpayer whose income is not so large that his exemption is not absorbed in the first class is taxed in the 20 per cent. class. This we submit is not only a personal classification, but what is more to the point, it is not a classification provided for by the statute. It is an addition to the Act of Congress made by the regulations of the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, which have no foundation in the Act of Congress.

While the courts will take judicial notice of regulations made by a department of the Government under authority of an Act of Congress, nevertheless the statute cannot, even with the sanction of the Secretary of the Treasury, be altered or amended.

Morrill v. Jones, 106 U. S. 466.

In the United States v. Eaton, 144 U. S. 677, Mr. Justice Blatchford said, page 687:

> "It was said by this Court in Morrill v. Jones, 106 U. S. 466, 467, that the Secretary of the Treasury cannot by his regulations alter or amend a revenue law, and that all he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

To the same effect see:

Williamson v. United States, 207 U. S. 425.

Mr. Justice White, at page 462.

Where the head of a department of the Government is authorized to make regulations in aid of a law, he cannot make regulations which defeat it.

Bong v. Campbell, 214 U. S. 236, 248;
Waite v. Macy, 246 U. S. 606, 609.

In the final analysis, the question in this case turns on when and how the taxpayer's exemption shall be deducted from the net amount of his income. There is no question that the construction placed by the defendant on this language, by taxing this exemption increases the Government's revenue. To accomplish this, we submit that the rules governing tax legislation have been disregarded and ignored. If there were no exemptions from taxation in the statute, then the matter would be very simple and the tax would be assessed according to the percentages set forth in the graduated tax, which would be borne equally by each dollar of net income in each class of invested capital, but for the reasons heretofore stated, Congress said that the taxpayer was entitled to earn, in accordance with his prewar percentages of profits, a sum not less than 7 or more than 9 per cent. upon his invested capital, which should be exempt from taxation, with a

specific exemption in the case of a corporation of $3000 to cover contingencies, and a graduated tax should be paid on the residue. The higher the income, the higher would be the tax. The tax increasing as the amount of the net income in excess of the deduction passes from class to class. This is the real scope and purpose of the act. The unauthorized regulations of the Treasury Department ignore this purpose and make the taxpayer's exemption the subject of tax, which we submit is done without authority to justify it, in the language of the Act of Congress.

M. HAMPTON TODD,
Of Counsel,
With Plaintiff-in-Error.

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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

GREENPORT BASIN AND CONSTRUCTION CO., plaintiff in error and appellant, *v.* THE UNITED STATES, DEFENDANT IN ERROR and appellee. } No. 31

IN ERROR TO AND APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is here on writ of error to and on appeal from the judgment of the United States District Court for the Eastern District of New York sustaining a general demurrer to the petition. (269 Fed. 58.)

The appellant, a domestic corporation, brought suit to recover the sum of $4,420.40, the amount of excess profits tax for the year 1917 alleged to have been unlawfully assessed against the appellant and collected by the collector of internal revenue. The tax was assessed upon excess profits under the provisions of section 201 of Title II of the act of October 3, 1917. (40 Stat. 303.)

110039—22—1

Section 201 provides for dividing a taxpayer's income into five classes or brackets, each bracket covering the amount of net income falling within a stated ratio between the taxpayer's net income and his invested capital. The first bracket includes net income "not in excess of fifteen per centum of the invested capital," and the fifth bracket includes net income "in excess of thirty-three per centum of such capital." The section levies a tax at progressive rates upon the amount of income included within each income bracket. Income in the first bracket is taxed at twenty per cent and income in the fifth and last bracket is taxed at sixty per cent.

The meaning of the words "net income" as used in the excess-profits tax provisions of the act of October 3, 1917, is defined in section 206 of the act and the meaning of the words "invested capital" is defined in section 207.

The first income bracket of section 201 provides for taxing only the amount of net income within the bracket which is "in excess of the deduction (determined as hereinafter provided)." The four subsequent income brackets contain no similar clause and make no reference to the "deduction." Section 203 defines the "deduction," which consists of an amount equal to from seven to nine per cent of invested capital, plus $3,000.

The parties in the present case are agreed upon the amount of the appellant's net income and the amount of its invested capital, as well as upon the amount of its "deduction" as authorized by section 203. The

controversy turns solely upon the proper method for giving effect to the deduction in calculating the tax imposed by section 201. The Government contends that the appellant's entire net income should be apportioned among the income brackets of section 201 and that the amount of its authorized deduction should then be subtracted from the amount of income included in the first income bracket. The appellant contends that the authorized deduction should first be subtracted from net income and that net income thus depleted constitutes the net income which is to be apportioned among the income brackets of section 201 for the purposes of the tax. The practical difference between the two methods of calculation is this: Under the Government's method the income subject to taxation at the lowest rate fixed by section 201, namely, twenty per cent, is reduced by the amount of the deduction; under the appellant's method the income subject to the highest applicable rate fixed by section 201 is reduced by the amount of the deduction.

The appellant filed a return with the proper collector of internal revenue showing for the appellant's taxable year ending October 31, 1917, a net income of $76,361.20, an invested capital of $215,615.55, and a deduction of $18,093.08. The petition alleged that the appellant in its return computed its excess-profits tax under the compulsion of the regulations prescribed by the Commissioner of Internal Revenue. The manner in which the appellant's excess-profits

tax was computed is set forth in the table printed herein as Table A.

TABLE A.

Invested capital	$215,615.55
Income	76,361.20
Deduction	18,093.08
Deduction estimated as follows:	
7 per cent of $215,615.55	15,093.08
Specific deduction	3,000.00
	18,093.08

Classes of income.		Income.	Deduction.	Balance subject to tax.	Rate.	Amount of tax.
Over.	But not over.					
1	2	3	4	5	6	7
					Per cent.	
$0.00	15 per cent invested capital.	$32,342.33	$18,093.08	$14,249.25	20	$2,849.85
15 per cent invested capital.	20 per cent invested capital.	10,780.77	None.	10,780.77	25	2,695.19
20 per cent invested capital.	25 per cent invested capital.	10,780.77	None.	10,780.77	35	3,773.27
25 per cent invested capital.	33 per cent invested capital.	17,249.24	None.	17,249.24	45	7,762.15
33 per cent invested capital.		5,208.09	None.	5,208.09	60	3,124.85
Total		76,361.20				20,205.31

Pro rata for fiscal year: Five-sixths of $20,205.31=$16,837.76.

The appellant's excess profits tax, as shown by the return filed by it, was $16,837.76 for the taxable year 1917. A tax in this amount was assessed against the appellant by the proper collector of internal revenue and was paid by the appellant. (R. 2.)

At the time of filing its return the appellant appealed to the Commissioner of Internal Revenue and filed with the collector of internal revenue a claim for refund, alleging that its excess profits tax for the taxable year 1917 was $12,417.36, and that it was, therefore, entitled to a refund of $4,420.40.

The petition further alleges that more than six months had elapsed since the filing of this appeal and this claim for refund, but that the commissioner had not rendered a decision upon the appeal or the claim for refund, and that no refund had been made or ordered. (R. 2.)

The claim for refund alleged that the Treasury regulations governing the computation of the excess profits tax were illegal, and that they resulted in the assessment against the appellant of a greater tax than was authorized by law. It asserted that appellant's excess profits tax should have been computed according to the method set forth in the table printed herein as Table B.

TABLE B.

Net income	$76,361.20
Deduction	18,093.08
Balance subject to tax	58,268.12

Classes of income.		Income.	Rate.	Amount of tax.
Over.	But not over.			
1	2	3	4	5
			Per cent.	
$0.00	15 per cent invested capital	$32,342.33	20	$6,468.47
15 per cent invested capital	20 per cent invested capital	10,780.77	25	2,695.19
20 per cent invested capital	25 per cent invested capital	10,780.77	35	3,773.25
25 per cent invested capital	33 per cent invested capital	4,364.25	45	1,963.91
33 per cent invested capital			60	
Total		58,268.12		14,900.82

Pro rata for fiscal year: Five-sixths of $14,900.82=$12,417.36.

APPLICABLE PROVISIONS OF ACT OF OCTOBER 3, 1917.

SEC. 200. * * * The term "taxable year" means the twelve months ending December thirty-first, excepting in the case of a corporation or partnership which has fixed its own fiscal year, in which case it means such fiscal year. * * *

SEC. 201. That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax (hereinafter in this title referred to as the tax) equal to the following percentages of the net income:

Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital.

SEC. 203. That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000.

SEC. 206. That for the purposes of this title the net income of a corporation shall be ascertained and returned * * * for the taxable year upon the same basis and in same manner as provided in Title I of the act entitled "An act to increase the revenue, and for other purposes," approved September eighth, nineteen hundred and sixteen, as amended by this act, except that the amounts received by it as dividends upon the stock or from the earnings of other corporations, joint-stock companies or associations, or insurance companies, subject to the tax imposed by Title I of such act of September eighth, nineteen hundred and sixteen, shall be deducted.

ARGUMENT.

The progressive tax rates fixed by section 201 are based upon the ratio between net income and invested capital. They can not, therefore, be based upon the ratio between net income depleted by a "deduction" and invested capital.

In construing section 201 of the act of October 3, 1917, it is important to bear in mind that section 206 exactly defines the meaning of the words "net

income" as used in the excess-profits tax provisions of that act. Section 206 states how "net income" shall be computed, and when the net income of a taxpayer has been ascertained according to the provisions of this section, the amount thus ascertained may be substituted for the words "net income" wherever they appear in the excess-profits tax provisions of the act.

The initial requirement of section 201 is that a tax shall be levied "equal to the following percentages of the net income." This implies that all of the net income is to be included within one or another of the succeeding income brackets. The appellant's net income for the taxable year was $76,361.20; therefore this amount is to be included among the income brackets or classifications of section 201. The collector of internal revenue followed this requirement and apportioned among the income brackets of the section the sum of $76,361.20.

The appellant, on the other hand, contends that section 201 permits it to subtract from net income the amount of the deduction authorized by section 203 and to apportion among the income brackets of the section, not net income, but net income less the deduction. By its method of computation only $58,258.12 is included in the income brackets of the section. By this computation a tax is not levied "equal to the following percentages of the net income," as required by section 201, but a tax is levied "equal to the following percentages of the net income less the deduction as hereinafter provided."

The appellant's method of computation is therefore a direct violation of the terms of section 201.

If section 201 contained no provision giving effect to the deduction authorized by section 203, there might be some basis for the appellant's contention that, although section 206 explicitly fixes the meaning of the words "net income," they nevertheless are used in section 201 to mean not "net income," but "net income less the deduction authorized by section 203." This construction is, however, impossible in view of the fact that the first income bracket of section 201 provides for making the deduction authorized by section 203. It reads:

> Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year.

The bracket covers income "in excess of" the deduction and "not in excess of" fifteen per cent of invested capital, in other words, the difference between these two amounts. It is therefore necessary in order to ascertain the amount of income falling within this bracket to take income equal to fifteen per cent of invested capital and subtract from this the amount of the deduction authorized by section 203. If the deduction should equal or exceed fifteen per cent of invested capital, no income would remain to which the applicable twenty per cent rate would attach.

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The collector of internal revenue calculated the amount of appellant's income taxable under the first bracket according to its requirements. From income equal to fifteen per cent of invested capital, namely, $32,342.33, he subtracted the deduction of $18,093.08, and applied the twenty per cent rate to the remaining amount of $14,249.25.

The computation made by the appellant, on the other hand, puts the entire sum of $32,342.33 in this bracket and applies the twenty per cent rate to this amount. Appellant's computation is therefore in violation of the terms of the bracket and could be made only if the bracket read somewhat as follows:

> Twenty per centum of the amount of net income remaining after making the deduction (determined as hereinafter provided) applied to an amount not in excess of fifteen per centum of the invested capital for the taxable year.

The succeeding brackets cover income equal to stated ratios to the invested capital, and the fifth and last bracket covers "the amount of the net income in excess of thirty-three per centum of such capital."

Thirty-three per cent of the appellant's invested capital for the taxable year is $71,153.13. If this amount is subtracted from its net income of $76,361.20, there remains $5,208.07 as the income falling within the fifth bracket. Under the computation made by the collector of internal revenue $5,208.09 was included within this bracket (the difference of

two cents being due to fractions of a cent eliminated in prior brackets). The computation of the collector is therefore a strict compliance with the provisions of the bracket and a tax was levied at the rate of sixty per cent of the amount within the bracket. Since by the appellant's computation no income whatsoever falls in the last bracket, its computation is directly contrary to the terms of this bracket.

The Government submits that the wording of section 201 in no instance sustains the interpretation which the appellant has sought to give to the section, but that it clearly authorizes the method by which the collector of internal revenue computed the appellant's excess profits tax.

The appellant has quoted *LaBelle Iron Works* v. *United States*, 256 U. S. 377, as supporting its interpretation of section 201 (brief, pp. 11–13), but the Government submits that the court in that case adopts the Government's construction of the section. The principal question there decided was that "invested capital," as defined in section 207 of the act of October 3, 1917, does not include the appreciation in value of property owned by a corporation. In approaching this question the court summarized the excess profits tax provisions of the act as follows (p. 383):

> As applied to domestic corporations, the scheme of this title was that, after providing for a deduction from income (section 203, p. 304) * * * it imposed (section 201, p. 303), in addition to other taxes, a graduated tax

> upon the net income beyond the deduction, commencing with twenty per centum of such net income above the deduction but not above fifteen per centum of the invested capital for the taxable year, and running as high as sixty per centum of the net income in excess of thirty-three per centum of such capital.

The court describes the twenty per cent tax as applying to income which is "above the deduction" and which does not exceed fifteen per cent of invested capital, but in the case of the sixty per cent rate the court does not refer to the deduction and describes it as applying to all income above thirty-three per cent of invested capital. This description of the sixty per cent rate is inconsistent with the appellant's view that the sixty per cent rate covers only the amount by which net income less the deduction exceeds thirty-three per cent of invested capital.

The method by which the collector of internal revenue computed the appellant's excess profits tax is further sustained by the decision of Judge Thompson in *Ehret Magnesia Mfg. Co.* v. *Lederer*, 273 Fed. 689. The court there gave judgment for the defendant in a suit in which the plaintiff sought to recover excess profits taxes upon the same theory upon which the appellant seeks recovery in this suit.

When the meaning of an act is doubtful, its legislative history may be referred to as an aid in discovering what the legislature intended it to mean. (*Holy Trinity Church* v. *United States*, 143 U. S. 457; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310.)

As originally adopted by the House, the excess-profits tax deduction was the same as it was in the preceding act of March 3, 1917 (39 Stat. 1000), namely, eight per cent of invested capital plus $5,000. (Cong. Rec., 65th Cong., first sess., vol. 55, pt. 7, p. 7580.) The Senate struck out the entire excess-profits tax title of the House bill and substituted as a basis for exemption the percentage of profits made during the years 1911, 1912, and 1913. (Cong. Rec., 65th Cong., first sess., vol. 55, pt. 7, p. 7581.) The conference committee of the two Houses then agreed upon the tax as enacted into law. Mr. Kitchin presented the conference report to the House on October 1, 1917, and in concluding his explanation of the conference report asked unanimous consent to extend his remarks in the Record "and to append some tables which may prove instructive and useful in the study of the revenue bill as agreed on by the conference committee." (Cong. Rec., 65th Cong., first sess., vol. 55, pt. 7, p. 7586.)

Immediately following Mr. Kitchin's remarks sixteen tables dealing with computation of the excess-profits tax are printed in the Record. The method of computation used in these tables is the same method used by the collector in computing the appellant's excess profits tax.

The tables printed as an extension of Mr. Kitchin's remarks show the view of the conference committee as to the meaning of the law. This view was, moreover, presented to the House before passage of the bill. Mr. Fordney, in explaining the conference re-

port on the revenue bill, said: "If the pending bill is enacted into law, the following table shows the total amount of income, corporation, and excess-profits taxes that would be paid * * *." He then gave six tables in which the excess-profits tax were computed on the same basis as that used by the collector in the present case. (Cong. Rec., 65th Cong., 1st sess., vol. 55, pt. 7, pp. 7592, 7593.)

Subsequently to the passage of the act of October 3, 1917, Congress indicated its approval of the method employed by the Treasury Department in computing the excess-profits tax imposed by that act.

Section 301 (a) of the act of February 24, 1919 (40 Stat. 1088), levied an excess-profits tax upon corporations for the taxable year 1918, and section 301 (b) levied a similar tax for subsequent taxable years. In both sections 301 (a) and 301 (b) income was divided into two brackets based upon the ratio of net income and invested capital, and income in the second bracket was taxed at a higher rate than income in the first bracket. Section 312 provided for an "excess-profits credit" similar to the deduction authorized by section 203 of the act of October 3, 1917. Section 301 (d) of the later act provided:

> In any case where the full amount of the excess-profits credit is not allowed under the first bracket of subdivision (a) or (b), by reason of the fact that such credit is in excess of twenty per centum of the invested capital, the part not so allowed shall be deducted from the amount in the second bracket.

If the appellant's method of computation were followed, the "excess-profits credit" would be subtracted before any income would be apportioned among income brackets. There would therefore never be a case "where the full amount of the excess-profits credit is not allowed under the first bracket." The fact that section 301 (d) made specific provision for such cases shows that Congress did not intend appellant's computation to be employed under the act of February 24, 1919, which taxes excess profits upon the same basis as did the act of October 3, 1917.

Certain regulations declaring the Treasury Department's construction of the act of October 3, 1917, were published by it as "Regulations No. 41." Article 17 of these regulations declared that in any case where the deduction authorized by section 203 was greater than the amount of income falling within the first bracket of section 201 "then any remaining portion of the deduction will be allowed under the second bracket, and continued if necessary into the succeeding bracket or brackets until the entire amount of deduction is allowed." This regulation prevented the taxpayer from suffering any hardship if its authorized deduction could not be entirely absorbed in the first income bracket.

The appellant contends that the collector's method of computation is unfair to small corporations because they may be taxed only at the sixty per cent rate, whereas a larger corporation with an equal percentage of profit will be taxed both at the lower rates provided in section 201 and at the sixty per cent

rate. (Brief, pp. 18–19, 24–25; additional brief, pp. 18–19.) Certainly the sixty per cent rate applying alike to all corporations on income above thirty-three per cent of invested capital is neither unjust nor unequal in its application. The fact that under the Treasury regulations small corporations might escape additional taxation at the lower rates provided in section 201, instead of being a hardship on such corporations, was a special advantage which they enjoyed because the deduction authorized by section 203 gave them a relatively larger relief from taxation.

The appellant contends that the Government's method of computation is inconsistent with that employed in other revenue cases. (Brief, pp. 16–17; additional brief, pp. 6–8.) No real analogy exists except in the case of laws involving progressive rates of tax. The income tax acts furnish such analogy and the methods there applied are similar to those adopted in this case.

Under the income-tax laws surtaxes are imposed on the basis of the taxpayer's net income without any allowance for exemptions or credits. Exemptions or credits are subtracted only from the amount subject to the normal tax. (Act of September 8, 1916, section 7 (a) [39 Stat. 761]; act of October 3, 1917, section 3 [40 Stat. 301]; act of February 24, 1919, section 216 [40 Stat. 1069]; act of November 23, 1921, section 216.) To subtract the deduction authorized by section 203 of the act of October 3, 1917, from income falling within the first bracket of

section 201 is analogous to the procedure under the income-tax laws of subtracting authorized exemptions or credits from the income subject to the normal tax. Under both schemes of taxation the exemption is for the benefit only of the income upon which the lowest rates of tax are imposed.

The Government submits that the wording of section 201 of the act of October 3, 1917, clearly authorized the method by which the collector computed the appellant's excess-profits tax; that the conference committee which drafted the excess-profits tax provisions of the act of October 3, 1917, intended the excess-profits tax to be computed upon the basis employed by the collector in this case; that this method of computation was approved by Congress in the excess-profits tax provisions of the act of February 24, 1919; and that the collector's method of computation is just and fair in its application.

The Government, therefore, requests this court to affirm the judgment of the United States District Court for the Eastern District of New York sustaining a general demurrer to the petition.

JAMES M. BECK,
Solicitor General.
ALBERT OTTINGER,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

OCTOBER, 1922.

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GREENPORT BASIN & CONSTRUCTION COMPANY *v.* UNITED STATES.

ERROR TO AND APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

No. 31. Argued November 17, 1922.—Decided January 2, 1923.

1. A judgment of the District Court in an action against the United States under Jud. Code, § 24, par. 20, to recover taxes paid under protest, is reviewable here by writ of error. P. 514.
2. In computing the excess profits tax imposed by the Act of October 3, 1917, c. 63, 40 Stat. 300, the exaction prescribed by § 201 is to be imposed, in its successive stages, upon the entire net income, except that, from the part of the net income prescribed for the first stage, the allowances made by § 203 are to be deducted. So *held*, where the allowances were less than 15 per cent. of the invested capital. P. 514.

269 Fed. 58, affirmed.

ERROR to and appeal from a judgment of the District Court sustaining a demurrer and dismissing the complaint in an action against the United States to recover taxes.

Mr. M. Hampton Todd, with whom *Mr. Percy L. Housel* was on the briefs, for plaintiff in error and appellant.

Mr. Assistant Attorney General Ottinger, with whom *Mr. Solicitor General Beck* and *Mr. Charles H. Weston*, Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Greenport Company had, in 1917, an invested capital of $215,615.55. Its net income was $76,361.20 in the taxable year ending October 31, 1917. Its prewar annual net income, calculated on a 7 per cent. basis, was $15,093.08; and the fixed statutory deduction $3,000. The company was thus subject (for five-sixth of the year) to the excess profits tax imposed by the Revenue Act of October 3, 1917, c. 63, §§ 201, 203, 40 Stat. 300, 303, 304.[1] The Government, following Treasury Regulation No. 41, Articles 16, 17, and form 1103, assessed the tax at $16,837.76. The company insisted that the correct amount was $12,417.36; paid the tax as assessed, under protest; and brought this suit for the difference, $4,420.40, in the

[1] Section 201: "That in addition to the taxes under existing law and under this act there shall be levied, assessed, collected, and paid for each taxable year upon the income of every corporation, partnership, or individual, a tax . . . equal to the following percentages of the net income:

"Twenty per centum of the amount of the net income in excess of the deduction (determined as hereinafter provided) and not in excess of fifteen per centum of the invested capital for the taxable year;

"Twenty-five per centum of the amount of the net income in excess of fifteen per centum and not in excess of twenty per centum of such capital;

"Thirty-five per centum of the amount of the net income in excess of twenty per centum and not in excess of twenty-five per centum of such capital;

federal court for the Eastern District of New York, under the Tucker Act. (Judicial Code, § 24, par. 20.) That court sustained a demurrer to the petition and entered judgment for defendant. 269 Fed. 58. The case is brought here by both writ of error and appeal. It is properly here on writ of error, *Chase* v. *United States*, 155 U. S. 489; *J. Homer Fritch, Inc.* v. *United States*, 248 U. S. 458. The sole question presented for decision is whether the method of calculating the taxes adopted by the Treasury is in harmony with the provisions of the Revenue Act.

The rate of exaction imposed by the excess profits tax grows, in stages, with the increase in the percentage earned on the capital. In the first stage—net income up to 15 per cent. on capital—the rate of exaction is four-twentieth. In the second-stage—net income from 15 to 20 per cent.—the rate is five-twentieth. In the third stage—net income from 20 to 25 per cent.—the rate is seven-twentieth. In the fourth stage—net income from 25 to 33 per cent.—the rate is nine-twentieth. In the last stage—net income over 33 per cent.—the rate is twelve-twentieth. What the net income is to which the respective rates of exaction apply is the question for decision. The company contends, in effect, that net in-

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"Forty-five per centum of the amount of the net income in excess of twenty-five per centum and not in excess of thirty-three per centum of such capital; and

"Sixty per centum of the amount of the net income in excess of thirty-three per centum of such capital."

Section 203: "That for the purposes of this title the deduction shall be as follows, except as otherwise in this title provided—

"(a) In the case of a domestic corporation, the sum of (1) an amount equal to the same percentage of the invested capital for the taxable year which the average amount of the annual net income of the trade or business during the prewar period was of the invested capital for the prewar period (but not less than seven or more than nine per centum of the invested capital for the taxable year), and (2) $3,000."

come as used concerning each stage, means not the whole net income—but the balance remaining after deducting from the net income the allowance for prewar profits and the fixed deduction. Under this contention the base to which the exactions should be applied would be, not $76,361.20, but that sum less $18,093.08, or $58,268.12. The Government insists that the exaction should be applied to the whole net income, except that from the net income prescribed for the first stage the allowances specifically provided for are to be deducted.[2] The differences in detail resulting from the two methods of calculation are shown in the margin.[3]

[2] Treasury Regulation No. 41, Article 17, provided that if the deduction exceeded 15% of the invested capital the amount in excess should be applied to the next succeeding tax bracket and so on until the deduction should be absorbed. Compare § 301(d) Act of February 24, 1919, c. 18, 40 Stat. 1057, 1089.

[3] Methods of Computation.

I. Government's Method.

First, apportion the net income into the tax brackets:

Percentages of invested capital	Amount
(1) 0 to 15%	$32,342.33
(2) 15% to 20%	10,780.77
(3) 20% to 25%	10,780.77
(4) 25% to 33%	17,249.24
(5) Above 33%	5,208.09
Total net income	$76,361.20

Second, apply the deduction to the first tax bracket:

(1) $32,342.33 minus $18,093.08 leaves $14,249.25.

Third, compute the tax:

(1) $14,249.25 at 20%		$2,849.85
(2) $10,780.77 at 25%		2,695.19
(3) $10,780.77 at 35%		3,773.27
(4) $17,249.24 at 45%		7,762.15
(5) $5,208.09 at 60%		3,124.85
$58,268.12	Total tax	$20,205.31
	Pro rata (5/8)	$16,837.76

II. Plaintiff's Method.

First, apply the deduction:

$76,361.20 minus $18,093.08 leaves $58,268.12 as taxable income.

Second, apportion the taxable income into the tax brackets:

Percentages of invested capital	Amount
(1) 0 to 15%	$32,342.33
(2) 15% to 20%	10,780.77
(3) 20% to 25%	10,780.77
(4) 25% to 33%	4,364.25
(5) Above 33%	none
Total taxable income	$58,268.12

Third, compute the tax:

(1) $32,342.33 at 20%		$6,468.47
(2) $10,780.77 at 25%		2,695.19
(3) $10,780.77 at 35%		3,773.27
(4) $4,364.25 at 45%		1,963.91
(5) none at 60%		none
$58,268.12	Total tax	$14,900.84
	Pro rata (5/8)	$12,417.36

The method of calculation adopted by the Treasury follows the clear language of the act; and its correctness is confirmed by the statement, and the illustrative tables, presented by the chairman of the Ways and Means Committee in submitting the Conference Report on the bill. 55 Cong. Rec., 65th Cong., 1st sess., Part 7, pp. 7580–7593. As the language of the act is clear, there is no room for the argument of plaintiff drawn from other revenue measures. Nor is there anything in *La Belle Iron Works* v. *United States*, 256 U. S. 377, 383–388, which lends support to plaintiff's contention.

Affirmed.